

# Law and the Executive in Britain

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A COMPARATIVE STUDY

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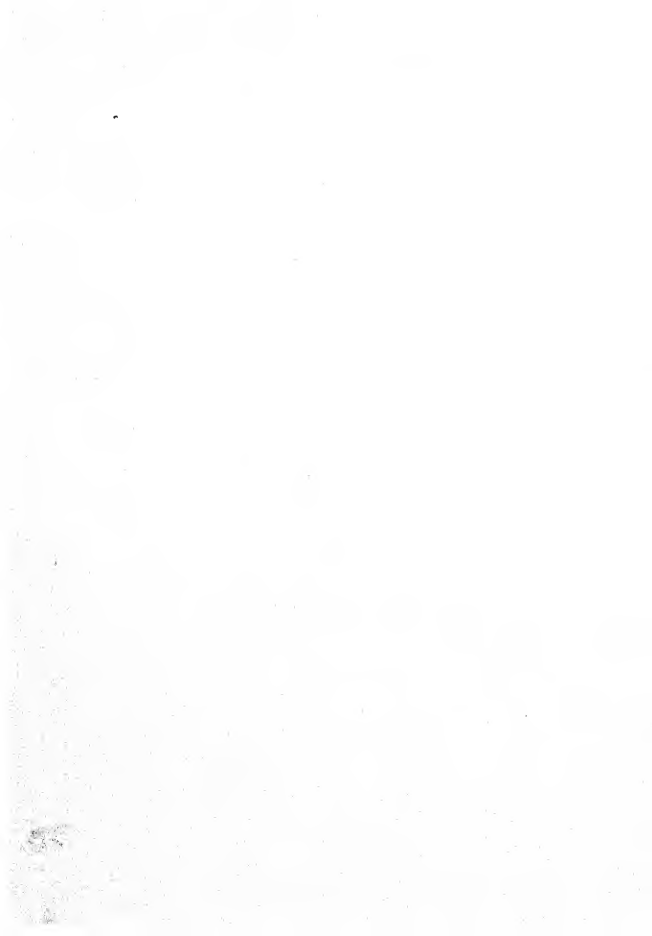
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To  
Arthur T. Vanderbilt

LEADER  
IN THE MOVEMENT FOR  
ADMINISTRATIVE-LAW REFORM





## PREFACE

It is now a generation since Lord Hewart launched his famous attack upon the Executive in Britain. Much has happened in the intervening two decades. American knowledge of English administrative law does not, unfortunately, go beyond *The New Despotism* and the reply to the Lord Chief Justice contained in the Report of the Committee on Ministers' Powers. It was out of a desire to fill the gap in American knowledge in this field that the study which culminated in this volume was undertaken.

British developments in administrative law are, I believe, of more than mere academic interest to Americans. The experience of a kindred people, who hold the same basic doctrines that we do, should be helpful in our evaluation of developments on this side of the Atlantic. The value of comparative study here is not diminished by differences—important though they may be—in the political structure of the two countries. As Sir Cecil Carr so aptly pointed out in his lectures to an American audience in 1940: "The fundamental differences between the United States and Britain in constitutional structure and in geographical scale cannot obscure the community of history and outlook. To both countries government, tolerated as an unfortunate necessity, is but the means to the end; to both countries the end is liberty."

I am indebted to many on both sides of the Atlantic for their encouragement and assistance. My chief debt is to E. C. S. Wade, Downing Professor of the Laws of England in the University of Cambridge, who read the manuscript as it was being written and made many useful suggestions. If I have avoided the pitfalls that might otherwise beset an outsider in this field, it is largely due to his assistance. I should also like to acknowledge my gratitude to Sir Cecil T. Carr and Professor A. L. Goodhart for their com-

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BERNARD SCHWARTZ

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## CONTENTS

	<i>Page</i>
Preface	vii
I Executive Power and the Disappearance of Law	i
II Executive Power in Britain: 1. Delegated Legislation	24
III Executive Power in Britain: 2. Administrative Justice	68
IV Legislative Checks	102
V Judicial Control	143
VI 1. Ultra Vires	165
VII 2. Natural Justice	212
VIII 3. Law and Fact—The Scope of Review	277
IX Executive Power in Emergency	305
Table of Cases	365
British	365
American	371
Table of Statutes	374
British	374
American	377
Index	379



## CHAPTER I

### EXECUTIVE POWER AND THE DISAPPEARANCE OF LAW

"In passing by the side of Mount Thai, Confucius came on a woman who was weeping bitterly by a grave. The Master pressed forward and drove quickly to her; then he sent Tze-Lu to question her. 'Your wailing,' said he, 'is that of one who has suffered sorrow on sorrow.' She replied, 'That is so. Once my husband's father was killed here by a tiger. My husband was also killed, and now my son has died in the same way.' The Master said, 'Why do you not leave the place?' The answer was, 'There is no oppressive government here.' The Master then said, 'Remember this, my children: oppressive government is more terrible than tigers.'"

Perhaps the basic problem with which political theory has wrestled, older by far than the above anecdote, has been the problem of ensuring that government shall be *less* terrible than tigers.<sup>1</sup>

The attempt to solve it has brought forth, to use the title of one of Ihering's works, the endless "struggle for law."

The concept of law as a check upon arbitrary power is as old as political theory itself. "He who bids the law rule," said Aristotle, "bids God and reason rule, but he who bids man rule adds an element of the beast; for desire is a beast, and passion perverts rulers, even though they be the best of men. Therefore the law is reason free from desire."<sup>2</sup>

<sup>1</sup> Paraphrasing Bertrand Russell, from whom the above anecdote is derived. Power (1938) 285.

<sup>2</sup> Politics, III, xvi, 5.

Yet inherent in the very idea of law is an antinomy, which causes the struggle for its attainment to be an endless one. A system of law, in its purest form, is an unreachable ideal. Instead, we see a continual progression between law and power—between government by law and government without law.

"Power and law, in their pure form, are antagonistic poles. The one pole represents the idea of arbitrary might, unrestrained by any rules of conduct. The other pole represents the idea of a social system in which power is limited by a maximum of effective checks and guaranties."<sup>3</sup> Neither is, by itself, wholly able to provide the means of government. Hence, history has seen a constant shifting between the two, as man has sought to find the optimum balance between these conflicting but necessary elements.

On the whole, however, the course of development has been toward law and away from unrestrained power as the dominant influence in government. This has been especially true of the common-law world.

The central and most characteristic feature<sup>4</sup> of our Anglo-American polity, one that has evoked countless praise from foreign observers, is embodied in the now almost axiomatic concept of the *rule or supremacy of law*. Dominant in our jurisprudence since the victory of the common-law courts over the Executive, this concept, like so many other phrases over which men fight, has never been capable of exact definition. It is rather "an attitude, an expression of liberal and democratic principles, in themselves vague when it is sought to analyze them, but clear enough in their results. There are many facets to free government, and it is easier to recognize it than to define it."<sup>5</sup>

In the first place, it must be emphasized that law in the sense in which we are using it here is not the same as legality in the

<sup>3</sup> Bodenheimer, *Jurisprudence* (1940) 28.

<sup>4</sup> Dickinson, *Administrative Justice and the Supremacy of Law* (1927) 32.

<sup>5</sup> Jennings, *The Law and the Constitution* (3d ed. 1946) 47.

juridical sense. "It is not enough to say with Dicey that 'Englishmen are ruled by the law, and by the law alone,' or, in other words, that the powers of the Crown and its servants are derived from the law; for that is true even of the most despotic State. The powers of Louis XIV, of Napoleon I, of Herr Hitler, of Signor Mussolini are derived from the law, even if that law be only 'The Leader may do and order what he pleases.'"<sup>6</sup>

This distinction between law and legality has too often been lost sight of. Thus, W. Ivor Jennings, quoted above to illustrate the distinction, has gone so far as to assert that Dicey's theory of the rule of law is "meaningless,"<sup>7</sup> for there is no opposition between law and governmental power. "Indeed, if the Stuart kings had substantiated their claims to legislate and tax without the consent of Parliament and to suspend and dispense with laws, these powers would still be recognized by 'regular law.'"<sup>8</sup> The rule of law is thus relegated to the position of a "principle of political action, not a purely juridical principle."<sup>9</sup>

The same confusion is apparent in the ideas of recent American theorists—exponents of the "realist" school of jurisprudence. Law, according to their views, is "what officials do," or "whatever is done officially."<sup>10</sup> "This doing of something about disputes, this doing of it reasonably, is the business of the law. And the people who have the doing of it in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes* is, to my mind, the law itself."<sup>11</sup> But this, too, ignores the difference between law and governmental power. "It is not, as we used to think under the influence of the common-law doctrine of supremacy of

<sup>6</sup> *Id.* at 46.

<sup>7</sup> Holdsworth, Book Review, 55 L. Q. Rev. 585, 586 (1939).

<sup>8</sup> Jennings, *op. cit. supra* note 5, at 287.

<sup>9</sup> *Id.* at 288.

<sup>10</sup> Pound, "Fifty Years of Jurisprudence" 51 Harv. L. Rev. 777, 800, n.74 (1938).

<sup>11</sup> Llewellyn, *The Bramble Bush* (1930) 3.



the law, that things may be done officially according to law or without law or against law, with appropriate legal remedy in the last two cases. What is done officially is law in itself.'"<sup>12</sup>

Law, as we have seen, is but one of the competing elements in juristic and political theory and practice. The other is power, unrestrained by law. Looked at institutionally, the concept of law has been represented by the judiciary, that of power by the Executive. From this viewpoint, the basic problem may be expressed in another way. "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates."<sup>13</sup>

The rule-discretion dichotomy is of essential importance in understanding the rule of law. There has been a continual movement in history back and forth between wide discretion and strict, detailed rule.<sup>14</sup> Historically, the struggle has been between the Crown, on the one hand, and the legislature and judiciary, on the other. Recently, it has taken new form in conflicts between law and administration. The emphasis, here too, has shifted; for, from an early paralysis of administration by law, we now see the need for the exercise of a legitimate administrative discretion, though ultimately controlled by law.

Extremist legal theory postulates the disappearance of this proviso. Dean Pound has drawn attention to the increasing currency of ideas "as to the disappearance of law in an ideal society, as to a politically organized society in which there is to be no law but there are only to be administrative ordinances and orders, and as to a 'public law' which is to supersede the 'coordinating law,'"<sup>15</sup> is to put the official on a higher plane than the individual,

<sup>12</sup> Pound, *Administrative Law* (1942) 18.

<sup>13</sup> Pound, *An Introduction to the Philosophy of Law* (1925) 111.

<sup>14</sup> *Id.* at 112.

<sup>15</sup> Characterized by him as that "which secures interests by reparation and the like, treating all individuals as equal," as contrasted with "the 'subordinating law,' which prefers some or the interests of some, according to its measure of values." Pound, *Administrative Law* (1942) 11.

and is to allow subordination of the rights of some to the claims of others at the discretion of the officers of government.”<sup>16</sup>

Both the extreme right and the extreme left of contemporary juristic thought posit the disappearance of law as we know it from society. Though starting from different premises and professing different ideals, both reach the same result of a Power State, uncontrolled by law. Government is to be carried on by an unchecked Executive branch. Both the theory and the practice of these schools are the very antithesis of all that is connoted by the rule-of-law concept.

National Socialist and Soviet legal theories are reversions to justice without law.<sup>17</sup> Generality, equality, and certainty—the uniformity of judicial and magisterial action so essential to law—are looked upon as outmoded conceptions. Cases are to be decided, not according to strictly defined authoritative precepts, but according to “healthy public sentiment”<sup>18</sup> or “socialist conceptions of justice.”<sup>19</sup> Wide discretion and the individualized application of justice are thus given the broadest possible scope. “Not the *corpus juris Romani*,” said Lenin, “but our revolutionary consciousness of justice ought to be applied to ‘Civil Law relations.’”<sup>20</sup>

There is no room for law in the authoritarian National Socialist State, described by Ernest Fraenkel, in terms which illustrate the gulf between it and Anglo-American concepts, as the “prerogative state.”<sup>21</sup> In such a State, all legal authority is assumed by the Leader, who, as the Supreme Law Lord, has both the supreme

<sup>16</sup> Quoted in Carr, “Administrative Adjudication in America” 58 L. Q. Rev. 487, 488 (1942).

<sup>17</sup> See Pound, “Justice According to Law” 13 Col. L. Rev. 696 (1913).

<sup>18</sup> German Penal Code Amendment Law, 1935, quoted in McIlwain, Constitutionalism and the Changing World (1939) 268.

<sup>19</sup> Soviet Statute on the Courts, 1918, quoted in Schlesinger, Soviet Legal Theory (1945) 65.

<sup>20</sup> Quoted in *id.* at 150.

<sup>21</sup> Fraenkel, The Dual State (1941) 3.

legislative power and the power to set aside any legal judgment.<sup>22</sup> The exhortation of Frederick the Great, "Woe to the State which is afraid of the independent judge!", is ignored. The Leader is acknowledged to have the power to dismiss any judge. "Judges who do not recognize the needs of the hour will be removed from office."<sup>23</sup>

The administration of justice is characterized by its dualist character. Legal concepts are not applicable to the political sphere, which "is regulated by arbitrary measures, in which the dominant officials exercise their discretionary prerogatives."<sup>24</sup> Law, in the common-law sense, has thus been replaced by Executive absolutism. Such a State has been described as being under a permanent system of martial law, which, following Blackstone's famous definition, is "in truth and reality no law," for it "is built upon no settled principles, but is entirely arbitrary in its decisions."<sup>25</sup>

Juristic theory has kept pace with this revolution in constitutional practice. The basis upon which German law was built has been discarded. To quote a leading exponent of National Socialist juristic theory: "Law, for many decades, had been a subject of rationalist thought exclusively treated on the principle of technically polished logic. It was the school of Roman Law Jurisprudence that had replaced direct service to life with service to abstractions, with the result that the substance of juridical thought and science, no less than the personalities professionally connected with law, led a life of isolation, hardly understood by the people . . . . Service to the vital necessities of our people, not service to theories, is the ideal of German guardians of law."<sup>26</sup>

<sup>22</sup> The Times (London), April 27, 1942, p. 4, col. 6.

<sup>23</sup> Adolf Hitler, quoted in *ibid.*

<sup>24</sup> Fraenkel, *op. cit. supra* note 21, at 3.

<sup>25</sup> Commentaries, I, 413.

<sup>26</sup> Speech of Frank, then German Minister of Justice, quoted in McIlwain, *op. cit. supra* note 18, at 272.

It need hardly be added that the all-powerful Executive is to be the sole judge of what serves the "vital necessities" of society. \*

Socialist legal theory takes for its starting point the Marxist theories of the disappearance of State and law. Both State and law are seen as the instruments for the aggressive self-assertion of an economically dominant class.<sup>27</sup> "As soon as there is no longer any class of society to be held in subjection, as soon as, along with class domination, and struggle for individual existence based on the former anarchy of production, the collisions and excesses arising from them have been abolished, there is nothing more to be repressed which would make a special repressive force, a State, necessary . . . . The interference of State power in social relations becomes superfluous in one sphere after another . . . the government of persons is replaced by the administration of things and the direction of the processes of production. The State is not 'abolished'; it *withers away*." <sup>28</sup>

Clearly, as one commentator on this passage asserts, "what is expected to wither away is not political organization as such, which, on the contrary, is expected to exercise the most important functions in social life and to administer the social processes of production." <sup>29</sup> Rather, law in the common-law sense as a restraining influence upon arbitrary power is to cease to exercise such restraining function. Law is to be wholly replaced by administration. This is the practical meaning of the Marxist theory.

Soviet jurists, working from the authoritative starting point of the Marxist doctrine that law will disappear with the abolition of private property, have been much concerned with substitutes for law. Perhaps the leading exponent of this school has been Professor E. Paschukanis. According to him, all law has its basis in the exchange of commodities. The adjustment of controversies arising out of such exchange is seen as the end of law. Law,

<sup>27</sup> Pound, "Fifty Years of Jurisprudence" 51 Harv. L. Rev. 780 (1938).

<sup>28</sup> Engels, *Anti-Dühring* (1942 ed.) 308.

<sup>29</sup> Schlesinger, *op. cit. supra* note 19, at 24.

says he, will lose its *raison d'être* in a society where there are no conflicting individual interests requiring adjustment. "If there are no conflicting interests to be adjusted there is no need of law."<sup>30</sup> Thus, law will no longer be necessary in a Socialist society. "Only capitalism creates all the conditions necessary to enable the judicial element to obtain its highest development in social relations."<sup>31</sup> In the Socialist State, there will be no more law, but merely technical regulation; legal rules will be replaced by "social-technical" rules.<sup>32</sup> "The withering away of bourgeois Law can under no circumstances mean its replacement by some new categories of proletarian Law, but only the withering away of Law in general, i.e., the gradual disappearance of the juridical element from human relations."<sup>33</sup>

Technical regulation is posited as the substitute for law. But this is merely another form of Engels' thesis that, with the gradual transition to a Socialist State, the rule of law over men would be replaced by the mere administration of things. In terms familiar to us, as one writer has pointed out, it is obvious that these "social-technical" rules are identical and coextensive with administrative rules and regulations—with the acts of Executive officials unrestrained by law.<sup>34</sup> A doctrine of administrative absolutism is to take the place of law in the settlement of disputes.<sup>35</sup> "The more consistently the principle of authoritative regulation, excluding all references to an independent autonomous will, is carried through, the less room remains for an application of the

<sup>30</sup> Pound, "Fifty Years of Jurisprudence" 51 Harv. L. Rev. 780 (1938).

<sup>31</sup> Paschukanis, *The General Theory of Law and Marxism* (1925) 21, quoted in Schlesinger, *op. cit. supra* note 19, at 156. There is a German translation of this work entitled *Allgemeine Rechtslehre und Marxismus* (1929).

<sup>32</sup> Bodenheimer, *op. cit. supra* note 3, at 89.

<sup>33</sup> Paschukanis, *op. cit. supra* note 31, at 23, quoted in Schlesinger, *op. cit. supra* note 19, at 156. *But cf.* Vyshinsky, *The Law of the Soviet State* (1948 ed.) 50.

<sup>34</sup> Bodenheimer, *op. cit. supra* note 3, at 90.

<sup>35</sup> Pound, "Fifty Years of Jurisprudence" 51 Harv. L. Rev. 781 (1938).

category of law.”<sup>36</sup> In the State as postulated by Paschukanis, there “is to be no law, and but one rule of law, namely, that there are no laws, but only administrative orders for the individual case. Expediency is to be the guide for each item of judicial-administrative regulation.”<sup>37</sup>

Perhaps the best commentary on Paschukanis’ theory of arbitrary Executive power as a substitute for law is to be found in an address by Dean Pound: “The professor is not with us now. With the setting up of a plan by the present government in Russia, a change in doctrine was called for and he did not move fast enough in his teaching to conform to the doctrinal exigencies of the new order. If there had been law instead of only administrative orders it might have been possible for him to lose his job without losing his life.”<sup>38</sup>

These extreme views which posit the disappearance of law as the controlling element in society have resulted from imperative theories of the nature of law prevalent in Continental juristic thought since Ihering. If we consider law merely as the command of the State, the authoritarian State would be the law State par excellence.<sup>39</sup> Carried to their logical extreme, wholly imperative theories of law invest the State with, as it were, god-like authority. Ideas of justice and the end of law are excluded from legal and political theory. Whatever is done by the State, which in practice means by officials acting in the name of the State, receives the almost mystical attributes connected with the term *law*. The State, to quote Kelsen, is a “King Midas in whose hands everything he touches is transformed into law.”<sup>40</sup> The distinction between law and administration, so fundamental in our constitutional theory, is ignored, for every act of administra-

<sup>36</sup> Paschukanis, *op. cit. supra* note 31, at 78, quoted in Bodenheimer, *op. cit. supra* note 3, at 90.

<sup>37</sup> Pound, “Fifty Years of Jurisprudence” 51 Harv. L. Rev. 781 (1938).

<sup>38</sup> Pound, *Administrative Law* (1942) 127.

<sup>39</sup> Bodenheimer, *op. cit. supra* note 3, at viii.

<sup>40</sup> Kelsen, *Allgemeine Staatslehre* (1925) 242.

tion is, practically by definition, clothed at the same time with legal validity. Governmental acts are, through the use of words of such wide secondary significance as "law" and "sovereignty," impressed with ethical as well as legal authority. "What the State wills has therefore moral preeminence. What the State ordains begins to possess for you a special moral sanction superior in authority to the claim of group or individual. You must surrender your personality before its demands. You must fuse your will into its own. It is, may we not without paradox say, right whether it be right or wrong."<sup>41</sup> The concept of law as command has thus had within it the seeds of a revived absolutism as exemplified in the authoritarian State.

These theories, when contrasted with those that have dominated common-law thought, bring into sharp focus the two forces which are in conflict in contemporary legal and political theory, as they have been throughout history. To the concept of the State as *power* we have opposed that of the State as *law*. The doctrines that administration should be above law or that it is synonymous and coextensive with law are repugnant to the basic notions upon which our theory and practice rest.

American juristic thought and, above all, American constitutional practice have never completely eschewed natural law ideas.<sup>42</sup> It is true that any theory based upon the eighteenth-century law-of-nature school is wholly out of line both with philosophical theory and, even more so, with the facts of life, since the work of Kant. It was the failure to understand this that caused our courts until recently to attempt the impossible in seeking to judge the validity of contemporary legislation by a set of supposedly universal and eternal objective principles, which were, in fact, drawn from a highly temporary and subjective individualist ethic. But this is not to deny, in M. Gény's phrase, the unavoidable necessity of a minimum of natural law. The

<sup>41</sup> Laski, *Studies in the Problem of Sovereignty* (1917) 78.

<sup>42</sup> See Haines, *The Revival of Natural Law Concepts* (1930).

idealist element has never been wholly absent from Anglo-American juristic thought, however much men may have tried to reduce jurisprudence to an analysis of the "pure fact of law," uninfluenced by ethical factors. The very fact that our political theory has been dominated by the concept of constitutionalism since the eighteenth century serves to illustrate this.

What else is our concept of the *rule* or *supremacy of law* but a natural law concept? It is a normative as much as it is a descriptive term; it expresses an ideal as much as a juristic fact—an *ought* as much as an *is*. It is still a political battle cry as much as it is a legal doctrine.

But the rule of law is more than a natural law ideal; it is "the most fundamental characteristic"<sup>43</sup> of our constitutional theory, and, as such, has had an important influence upon our positive law. The classic attempt definitively to state these positive law aspects is that of Dicey. For our purposes, we can take his first two meanings of the rule of law; for his third use of the term is peculiar to his own country and expresses not so much a constitutional principle as a course of development.

"We mean, in the first place," says he, "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint . . ."<sup>44</sup>

"We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."<sup>45</sup>

<sup>43</sup> Hewart, Introduction, in Amos, *The English Constitution* (1934) vi.

<sup>44</sup> Dicey, *Law of the Constitution* (9th ed. 1939) 188.

<sup>45</sup> *Id.* at 193.



Valid though this attempt at definition may be, as far as it goes, it gives only a small part of the constitutional picture. Looked at as the antithesis of the Power State, the concept must include something more than the Diceian analysis. Nor is it, taken literally, even an accurate descriptive account. His first meaning, implying that every citizen is entitled to have his rights adjudicated in a common-law court, is clearly at variance with fact, in the light of the development of the administrative process. For administrative bodies "are not ordinary courts in Dicey's sense. 'Judicial' as their functions clearly seem to be, they are not 'courts' in the common-law meaning of the term. And they differ from common-law courts in precisely the particulars which furnish the reasons for the common-law's insistence that every individual shall be entitled to have his rights tried in a law court."<sup>46</sup> That Dicey himself saw this is shown in an article written near the end of his life in which he called attention to the bestowal upon Executive officials of "functions which in their nature belong to the law courts."<sup>47</sup> "Such transference of authority," he asserted, "saps the foundation of that rule of law which has been for generations a leading feature of the English Constitution."<sup>48</sup>

Must we then answer in the affirmative the question posed by Dicey in this article: Has the development of the administrative process tended to weaken the rule of law as our dominant constitutional principle? He, himself, did not answer this question squarely, but he implied that the constitutional doctrine was still preserved by his second meaning of the concept; "the fact that the ordinary law courts can deal with any actual and probable breach of the law by any servant of the Crown still preserves [the] rule of law."<sup>49</sup>

<sup>46</sup> Dickinson, *op. cit. supra* note 4, at 35.

<sup>47</sup> Dicey, "The Development of Administrative Law in England" 31 L. Q. Rev. 148, 150 (1915).

<sup>48</sup> *Ibid.*

<sup>49</sup> *Id.* at 152.

The weakness of Dicey's analysis is shown by its inability to take account of the rise of the administrative process other than in terms of its own negation. This, it would seem, is due to its basic presupposition of the competition between legal and Executive justice. It is true that, historically, law and administration have been rival agencies of social control in the common-law world. The rule of law was considered to require the subordination of administration, and any attempt to allow it any scope was considered as an inroad into the constitutional doctrine. This "bad adjustment between law and administration, traditional in common-law countries for historical reasons, gave rise to conditions of mutual distrust on the part of courts and administrative agencies."<sup>50</sup> But this condition is now a thing of the past. The problem today is seen not in terms of one or the other seeking to take over the field. Both law and administration are recognized as complementary, not as competing, elements of social control. Contemporary theory seeks to determine the proper place of each and to partition the field between them, not to exclude one or the other.<sup>51</sup> We have recognized, in the words of Mr. Chief Justice Stone, that law and administration "are not to be regarded as wholly independent and unrelated instrumentalities of justice . . . . Neither body should repeat in this day the mistake made by courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded as an alien intruder, to be tolerated if must be, but never to be aided or encouraged by the other in the attainment of the common aim."<sup>52</sup>

"But to admit that the development of the administrative process is necessary does not involve admitting that it should be free of checks such as a due balance between the general security and the individual life has led us to impose on both the legislative

<sup>50</sup> Pound, *Administrative Law* (1942) 105.

<sup>51</sup> See Pound, "Jurisprudence" in 8 *Encyc. Soc. Sci.* 477 (1932).

<sup>52</sup> *United States v. Morgan*, 307 U. S. 183, 191 (1939).

and the judicial process.”<sup>53</sup> Few will dispute the need for increased power in the Executive to cope with modern conditions; at the same time, as, in Madison’s phrase, “it will not be denied that power is of an encroaching nature,”<sup>54</sup> such power must be controlled by law lest it become arbitrary. The disappearance of law as a controlling factor leads, as recent history has shown, to the Power State in its most ruthless form.

The concept of the rule of law, conceived of as the safeguard against arbitrary governmental power, rests upon certain constitutional ideas. It presupposes, in the first place, that there are certain legal principles above the State. This is not to go as far as some who assert that the State is limited by a fundamental rule or principle of right and law (*règle de droit*)<sup>55</sup> and that “there is an objective law superior to government.”<sup>56</sup> In our sense, we merely assert that there are certain principles which the State, sovereign power though it is, cannot abrogate. These are what we usually comprehend by the expression “individual rights of the person.” They are what an earlier age called “the natural rights of man” and are the sort of thing guaranteed in our various bills of rights. It has become the fashion of late to assert that the individual has no rights but only duties, and that any claim to the contrary is an outmoded survival of the law-of-nature school. It is true that men may differ about specific rights included in this concept; true also that, with the growth of government as a positive force in social and economic life, individual rights have come to be sharply restricted in favor of what have been conceived to be the overriding interests of society. But a minimum of individual self-assertion must still remain. Freedom of the person, of belief, and of expression of opinion

<sup>53</sup> Pound, *Administrative Law* (1942) 26.

<sup>54</sup> Quoted in Allen, *Law and Orders* (1945) 10.

<sup>55</sup> Duguit, *Manuel de droit constitutionnel* (1918) 2. See Pound, “Fifty Years of Jurisprudence” 51 *Harv. L. Rev.* 468 (1938).

<sup>56</sup> Duguit, *Les Transformations du droit public* (1913), translated by Laski as *Law in the Modern State* (1921) 70.

are essential characteristics of the Law State. For the State that infringes them is already on the way to becoming a Power State. There is, therefore, a fundamental truth in Lord Hewart's remark that the "principle of the Rule of Law is really the security for what are often called the liberties of the subject."<sup>57</sup>

Montesquieu may have erred in assuming that free government, like all Gaul, is divided into three parts. Some separation of governmental power there must be, however, in a State that is controlled by law. The earlier tendency to carry Montesquieu's doctrine to an analytical logical extreme, to divide government into three watertight compartments, led to the inevitable reaction, so that, of late, the separation of powers has come to be looked upon as an outmoded idea of the eighteenth century, "said to belong to the age of etiquette, the age of overrefinement, when every practical activity was embarrassed by ceremonial and checks."<sup>58</sup> Both extreme views must be rejected. While, as Mr. Justice Cardozo put it, "the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor,"<sup>59</sup> still there is the basic lesson against the overconcentration of power in any one branch of government. In applying the doctrine, there "must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety."<sup>60</sup> But some division of power there must be in a State governed by the rule of law. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. . . . where the *whole* power of one department is exercised by the same

<sup>57</sup> Hewart, *op. cit.* *supra* note 43, at vi.

<sup>58</sup> Pound, *Administrative Law* (1942) 45.

<sup>59</sup> *Panama Refining Co. v. Ryan*, 293 U. S. 389, 440 (1935).

<sup>60</sup> *Ibid.*

hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.”<sup>61</sup> In the Power State, characterized by the disappearance of law, all governmental power is concentrated in an omnipotent Executive. “The doctrine of the separation of powers,” said Mr. Justice Brandeis in a famous passage, “was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.”<sup>62</sup> It is in this sense that the doctrine is an essential part of the rule of law.

It will, however, be objected that this is not so much a picture of the Law State as a description of certain basic American constitutional principles. The notions of rights above the State and of an inherent division of governmental power surely do not apply to Britain, where the supremacy of Parliament has been the dominant constitutional feature since 1688. We must, first of all, admit the tendency of the jurist to posit universals which are in fact but idealized descriptions of his own system. That the principles herein enunciated are applicable only to the common-law world is readily admitted. For law as a bridle upon governmental power is peculiarly the Anglo-American contribution to political science, and any theory in terms of the rule of law must of necessity be based upon common-law constitutional practice. The “liberties of the subject” and a partition of governmental power are as much a part of the British Constitution as of our own. True it is that, in theory, Parliament, being supreme, could do away with these doctrines. In practice, however, they are as much above the State as they are in this country. They differ only in their theoretical foundation. The legislature being supreme, they are, to use an apt Continental term, auto-limitations by Parliament of its own sovereignty. If they were abrogated, the rule of law would cease to be part of the British Constitution.

<sup>61</sup> The Federalist, No. 47 (Madison).

<sup>62</sup> Myers v. United States, 272 U. S. 52, 293 (1926).

As put by Professor Holdsworth: "It is a corollary from this conception of the rule of law that the judicial power of the State is, to a large extent, separate from the executive and the legislature. . . . it is clearly not true to say that judges who are allowed, for reasons of State, to impose sentences not prescribed by the law are acting in accordance with the rule of law. In such a case they are acting not as judges but as agents of the executive. If it be said that they are acting in accordance with the rule of law because the law allows them so to act, the answer is that if the law permits such a course of action, the rule of law has in effect been abrogated by the Legislature; for in such a case the separation between the judicial power and the executive, which is an essential feature of the rule of law, has been eliminated."<sup>63</sup>

Justice according to law<sup>64</sup> is the outstanding characteristic of the State in which the rule of law prevails. This, on the face of it, seems similar to Dicey's first principle. We differ from him, however, in not assuming that the rule of law requires judicial justice in the settling of all disputes. What that concept does require is justice according to law either as the determining or the controlling factor. In so far as disputes are committed to agencies other than courts, judicial control of their determinations is essential. It is only to the extent that judicial justice serves to keep these other agencies in line that the rule of law can be said to be maintained. That is why the problem of judicial review of administration is the pivotal one in all discussions of administrative law. "For just in so far as administrative determinations are subject to court review, a means exists for maintaining the supremacy of law, though at one remove and as a sort of secondary line of defence."<sup>65</sup>

This problem will grow rather than diminish in importance in the type of State toward which we are moving. It has become

<sup>63</sup> Holdsworth, Book Review, 55 L. Q. Rev. 585, 587 (1939).

<sup>64</sup> See Pound, "Justice According to Law" 13 Col. L. Rev. 696 (1913).

<sup>65</sup> Dickinson, *op. cit. supra* note 4, at 37.

commonplace that we are in a period of transition and that traditional theories of the State no longer serve to explain contemporary political developments. Of attempts to restate the theory of the State, we can choose as the starting point for our purposes that of Léon Duguit. He postulates what may be called the Public-Service State, in contradistinction to the generally accepted concept of the Sovereign State. Sovereignty is no longer valid as the central notion in the theory of the State. Doctrines of the State as Will—as will of the divinity (theocratic), as will of the monarch (monarchic), or as will of the *demos* (democratic)—do not suffice as the basis of State power. The idea of sovereignty is replaced by that of public service. "The idea of public service lies at the very base of the theory of the modern state."<sup>66</sup> Once the functions of the State cease to be looked at in the negative light of merely keeping the peace, it becomes apparent that its *raison d'être* lies in the social services it performs. In them lies the basis of the allegiance owed the State; to perform them it has been given a monopoly of power.

The concept of public service as the basis of the modern State is one that fits the changing conditions of today, for its content is not conclusively defined. "The content of public services is always varying and in a state of flux. It is even difficult to define the general direction of such change. All that can be said is that with the development of civilisation the number of activities related to public need grows and as a consequence the number of public services grows also. That is logical enough. Indeed, civilisation itself is simply the growth of all kinds of needs that can be satisfied in the least time. As a consequence, governmental intervention becomes normally more frequent with the growth of civilisation because government alone can make civilisation a thing of meaning."<sup>67</sup>

Public service implies operation or regulation by government.

<sup>66</sup> Duguit, *op. cit. supra* note 56, at xliv.

<sup>67</sup> *Id.* at 45.

In this sense, the Public-Service State is fast becoming the type in the modern world. Different States may concentrate upon different aspects. Thus, Britain emphasizes the operational aspect while we emphasize the regulatory; but the concept of public service dominates both.

The State performs its public-service functions through Executive officials; the expansion of the public-service concept has been manifested in the growth of the administrative process. "It is by means of administrative acts that the State realizes its intervention so frequent and so active in all the domains of social life, industry, commerce, education, and the produce of capital and labor; it is by administrative acts that the State obtains and administers the enormous capital needed by it to accomplish its mission; it is by similar acts also that the State fulfills its duties of assistance and protection of the weak, the unfortunate, and the infirm."<sup>68</sup>

To carry out these public-service functions, as we have seen, the State has been given a monopoly of power. Yet it is precisely here that the great danger lies. As its public-service functions grow, the State tends more and more to become the all-dominant factor in society. In the Negative, or Laissez-faire State, government was, after all, but one of many competing power structures. The individual was affected less by it than by those inferior institutions with which he normally dealt. In the State toward which we are evolving, on the other hand, government tends gradually either to take over or to control the functions heretofore performed by these other institutions. As it does so, it comes into ever-increasing contact with the individual life. "It is in this ceaseless contact of the individual with the State that the danger of arbitrariness has especially arisen."<sup>69</sup>

In the principle of the rule of law, we in the common-law world have the means of assuring that the transition to the Public-

<sup>68</sup> Duguit, *Manuel de droit constitutionnel* (1918) 40.

<sup>69</sup> *Id.* at 39.



Service State will not lead to Executive absolutism. Those who, like Professor Hayek, assert that that principle is consistent only with a laissez-faire economy<sup>70</sup> are really assuming its disappearance as a controlling force. For the concept of the Public-Service State is on the way to realization in practice in most of the world, and even we in this country are moving far in that direction. To assume that our constitutional polity will prove unworkable in the type of State toward which we are moving (for that, in effect, is what Hayek is doing in assuming the incompatibility of law with that kind of State) is impliedly to assert that only an all-powerful Executive is competent to perform the tasks of government in that type of State. Such an assumption is unwarranted. With Dean Pound we may invoke the pragmatist criterion. "Our theory has worked—to adapt the answer of Diogenes, *solvitur gubernando*. Continental European theories have produced no such results."<sup>71</sup>

Ever since Kant, men have posited two alternative types of States. It was assumed that the only "alternative to the despotic or police state (Polizeistaat) was the State which did nothing save maintain order and conduct external relations."<sup>72</sup> Law was thought of as compatible only with the latter type. But this twofold classification is not necessarily an exhaustive one. May we not assume the possibility of an intermediate type of State—one that takes on a positive aspect through the public-service concept, but in which, at the same time, the tendency to Executive absolutism, which might otherwise accompany the tremendous growth of governmental power, is checked by law? Is not the need then in this transitional period to maintain with undiminished vigor the principle of the rule of law which has served us so well as the safeguard against absolutism?

There are those, however, who insist that the great need in

<sup>70</sup> Hayek, *The Road to Serfdom* (1944) c. VI.

<sup>71</sup> Pound, *Administrative Law* (1942) 56.

<sup>72</sup> Jennings, *op. cit. supra* note 5, at 52.

the Public-Service State will be to increase the efficiency of administration. Any checks upon administration must be largely internal, for to allow an alien branch of government to interfere would unduly hamper administrative efficiency. The great safeguard, they say, lies in the development of checks similar to those upon the judicial process—the formation of professional standards and settled ideals of quasi-judicial conduct, the development of adequate procedural rules, professional criticism, internal review, and the like. Above all, great stress is laid upon the acquisition by the administrator of the “judicial mind.” “If that can once be grasped,” remarked a leading British administrator before a royal commission, “none of the rest matters.”<sup>73</sup>

Such a statement, however, if more than a pious wish, ignores basic differences between the judicial and administrative processes. The administrator can never wholly acquire the “judicial mind,” for the administrative process falls short, by its very nature, in certain vital characteristics which are necessary to its acquisition. In the first place, the administrator lacks the independence which characterizes the judge. “Administrative tribunals do not have that independence from government which is one of the traditionally prized guaranties of the justice administered by our common-law courts. Their adjudications, taking place as very part and parcel of the process of government, are exposed to the influence of all the political forces which act upon government.”<sup>74</sup> The administrator is, after all, a member of the Executive branch and will rarely act against its policy. This is more true in Britain than in this country, where certain administrative officials have been accorded some degree of “independence” by a leading Supreme Court decision.<sup>75</sup> But, even apart from the question of the

<sup>73</sup> Sir Claude Schuster, quoted in Robson, *Justice and Administrative Law* (2d ed. 1947) 256.

<sup>74</sup> Dickinson, *op. cit. supra* note 4, at 36.

<sup>75</sup> *Humphrey's Executor v. United States*, 295 U. S. 602 (1935).

practical effects of the *Humphrey* doctrine,<sup>76</sup> the administrator, even here, clearly does not have anything like the degree of independence that is the judge's most prized possession.

Nor can the administrator decide disputes with that "cold neutrality of an impartial judge," of which Burke speaks. The very purpose of administration is to get things done. An administrative agency is created to accomplish certain purposes and it would be derelict in its duty if it were not biased in favor of those objects for which it was created. Thus Dean Landis speaks of those members of an administrative agency who have judicial functions as having "a proper bias toward its point of view."<sup>77</sup> Administration that is wholly impartial will fail to perform those tasks which the legislature has assigned to it. A board set up to ensure collective bargaining cannot take a wholly disinterested attitude as between an employer and an employee before it. A minister to whom has been assigned the task of carrying out a housing program cannot take a wholly impartial attitude as between a property owner and a local authority which seeks compulsorily to acquire his property as part of a housing scheme.

These defects are inherent in administration. Attempts to ameliorate them through purely internal checks lose sight of the fact that administration and not justice is the prime purpose of the administrative process. What is needed, rather, is the assertion of judicial control over administrative excesses. Especially will this be true as State power increases. The need for an independent control of Executive power will increase in proportion as that power itself increases; for the increased scope of governmental functions will lead to the Power State unless Executive power is controlled by law.

Great emphasis should be placed upon the use of the term *control*. An attempt to make the courts do more than control,

<sup>76</sup> See Rogers, "The Independent Regulatory Commissions" 52 Pol. Sci. Q. 1, 7 (1937).

<sup>77</sup> Landis, *The Administrative Process* (1938) 104.

an attempt to substitute judicial for Executive justice, will be but a repetition of our errors of the last century. Adequate control of administration is preserved if judicial review can be had to ensure the following: (1) *ultra vires*—that the administrative action or determination was within the powers conferred by the legislature; (2) *natural justice*—that what the Supreme Court has called the “fundamentals of fair play”<sup>78</sup> have been preserved; (3) *substantial evidence*—that the administrative determination is based upon rational evidence of a probative value. In this country there is, of course, the further overriding ground of constitutionality—whether the legislative or administrative action is *ultra vires* the organic instrument.

The presence of these grounds of review, aside perhaps from the constitutional one, is essential if the rule of law is to be preserved. Attempts to restrict them must be judged in the light of Continental disappearance of law theories, with all that they connote. Review to such extent both recognizes the place of administration and the need for its control. It would not unduly hamper administration, whose role must undoubtedly grow as the public-service functions of the State increase, but would, at the same time, ensure that the growth of Executive power would not lead to the Power State.

<sup>78</sup> Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 143 (1940).

## CHAPTER II

### EXECUTIVE POWER IN BRITAIN:

#### I. DELEGATED LEGISLATION

The change in the role of the State from that of passive bystander to that of active participant has manifested itself at so many points in the social and economic scene as to have become almost a commonplace. "The scope and character of government have changed enormously in the last fifty years. Formerly, government was chiefly regulatory and negative: its main task (apart from defence) was to keep the ring and maintain fair play while private interests asserted themselves freely. Today, government is largely concerned with the administration of social services, and has become positive in a new sense. A century ago, the State acted mainly as policeman, soldier and judge. Today, the State acts also as doctor, nurse, teacher, insurance organiser, house builder, sanitary engineer, chemist, railway controller, supplier of gas, water and electricity, town planner, pensions distributor, provider of transport, hospital organiser, road maker, and in a large number of other capacities."<sup>1</sup>

This is but another way of stating the theory of the State in terms of public service—this time, from the point of view of the practical effects of the type of State toward which we are evolving. The change from government as a negative factor to government as a positive force in society, *i.e.*, from the Laissez-faire to the Public-Service State, has necessitated a tremendous expansion in governmental authority. The new role of the State

<sup>1</sup> W. A. Robson, in Committee on Ministers' Powers, Minutes of Evidence (1932), hereafter cited as Minutes of Evidence, 52.

could only be fulfilled through the use of far greater power than had heretofore been concentrated in government. The repository of such power has been that branch of government which, by its very nature, is the one suited to carry out the social-service functions of the State, namely, the Executive branch. Institutionally, the increase in Executive power has manifested itself in the growth of administrative authorities, in the rise of the administrative process. Legally, the result has been the development of administrative law.

How has the common-law world, notable for the diffusion rather than the concentration of authority—for “checks and balances” and the tripartite division of power—how has our polity been able to concentrate sufficient authority in government to enable it to perform its public-service functions? This has been accomplished through the delegation of both legislative and judicial powers to the Executive branch, enabling it to deal with the problems facing government today through, as it were, the concentration in it of all three types of governmental power.

The maxim against the delegation of power—*delegata potestas non potest delegari*<sup>2</sup>—has in this country been elevated to the position of an unwritten constitutional principle. Applied literally, it would have prevented the rise of the administrative process, for the exercise of power both legislative and judicial in nature is the essential part of the work of administrative agencies. A rigid, inflexible application of the maxim against delegation is, therefore, neither desirable nor feasible. This was seen at an early time by Mr. Chief Justice Marshall, who, perceiving that there are powers of a doubtful nature which need not be arbitrarily fitted into the Montesquieuian trichotomy, held that it was within the legislative competence to assign their exercise to the Executive branch. “The line has not been exactly drawn which separates those important subjects, which must be entirely

<sup>2</sup> See Duff and Whiteside, “*Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*” 14 *Corn. L. Q.* 168 (1929).

regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up details."<sup>3</sup>

But there were few who, like the great Chief Justice, could openly admit that the constitutional maxim was not inflexible. The resulting judicial dilemma, when our courts finally were squarely confronted with delegation cases, was resolved by the judicious choice of words to describe the delegated power. The authority transferred was, in Justice Holmes's felicitous phrase, "softened by a quasi,"<sup>4</sup> and the courts were thus "able to grant the fact of delegated legislation and still to deny the name."<sup>5</sup> This result is well put in Professor Cushman's syllogism:

*"Major premise:* Legislative power cannot be constitutionally delegated by Congress.

*"Minor premise:* It is essential that certain powers be delegated to administrative officers and regulatory commissions.

*"Conclusion:* Therefore the powers thus delegated are not legislative powers."<sup>6</sup>

They are instead "administrative"<sup>7</sup> or "quasi-legislative"<sup>8</sup> powers.

In spite of the maxim against delegation, then, the American legislature has been able to confer very great authority upon the Executive. The extent of delegation had, indeed, become so great that Elihu Root could conclude in 1916 that, because of the rise of the administrative process, "the old doctrine prohibiting the delegation of legislative power has virtually retired from

<sup>3</sup> Wayman v. Southard, 10 Wheat. 1, 42 (U. S. 1825).

<sup>4</sup> Dissenting in Springer v. Government of the Philippine Islands, 277 U. S. 189, 210 (1928).

<sup>5</sup> Willis, The Parliamentary Powers of English Government Departments (1933) 7.

<sup>6</sup> Cushman, The Independent Regulatory Commissions (1941) 429.

<sup>7</sup> United States v. Grimaud, 220 U. S. 506, 516 (1911).

<sup>8</sup> Humphrey's Executor v. United States, 295 U. S. 602, 624 (1935).

the field and given up the fight.”<sup>9</sup> Since that time, however, we have been forced to a reconsideration of the situation by two decisions of the Supreme Court in 1935,<sup>10</sup> arising under the National Industrial Recovery Act.<sup>11</sup>

Section 3 of that Act authorized the President to approve “codes of fair competition” for the governance of particular trades and industries. When a code was approved, its provisions were to be the “standards of fair competition” for the trade or industry concerned, and any violation of such standards was to be deemed “an unfair method of competition” within the meaning of Section 3 (b) of the Federal Trade Commission Act,<sup>12</sup> and hence punishable penally.

✓ In holding the Act invalid, the Court stated, through Mr. Chief Justice Hughes: “Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.”<sup>13</sup>

<sup>9</sup> Presidential Address, 41 A. B. A. Rep. 368 (1916).

<sup>10</sup> Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935); Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).

<sup>11</sup> 48 Stat. 195 (1933).

<sup>12</sup> 38 Stat. 717 (1914).

<sup>13</sup> Schechter Poultry Corp. v. United States, 295 U. S. at 541.



The rationale of the *Schechter* case lies in the extent of power delegated. The authority conferred amounted, in effect, to a virtual abdication of legislative power by Congress over a wide area of the national economic scene. In the words of Mr. Justice Cardozo: "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery to correct them . . . This is delegation running riot. No such plenitude of power is capable of transfer."<sup>14</sup>

Delegations of power in this country to be valid must be limited by standards; "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."<sup>15</sup> The discretion conferred must not be so wide that it is impossible to discern its limits. There must instead be a measure to which the exercise of the delegated power must conform. This is the fundamental truth in the maxim against delegation; delegation must not be so indefinite as to amount to an abdication of the legislative function. This is but another way of stating Madison's warning against the overaccumulation of governmental powers in any one branch. The role of uncanalized delegations in undermining the Weimar Republic<sup>16</sup> is most pertinent in any consideration of the value of the *Schechter* doctrine. That doctrine enables our courts to ensure that the growth of Executive power necessitated by the transition to the Public-Service State will not be an uncontrolled one. Delegations of power must be limited ones—limited either by legislative prescription of ends and means, or even of details, or by limita-

<sup>14</sup> *Id.* at 551.

<sup>15</sup> *United States v. Chicago, M., St. P. & P. R. R.*, 282 U. S. 311, 324 (1931).

<sup>16</sup> See Anonymous, "The Place of Law in Germany" 59 L. Q. Rev. 134, 147 (1943).

tions upon the area of the power delegated. The enabling legislation must, in other words, contain a framework within which the Executive action must operate.

The maxim against the delegation of legislative power and its interpretation in the *Schechter* case can, of course, have no immediate bearing in a survey of the practice in Britain. Parliament being supreme can pass any legislation it desires. But to admit that the American doctrines are not directly applicable is not to deny that they have any relevancy in a discussion of the British experience. If, as we have asserted, the *Schechter* doctrine is a fundamental one in controlling Executive power, its application is not limited to this side of the Atlantic. It must, therefore, be kept in mind even in a comparative survey, not, of course, as a constitutional principle, but as a guide to which one would desire existing practice to conform.

In this connection, it is interesting to note that the Committee on Ministers' Powers, which, as we shall see, was the British counterpart of our Attorney General's Committee on Administrative Procedure, strongly urged something very akin to the *Schechter* doctrine to which the legislative practice should conform. "The precise limits of a law-making power which Parliament intends to confer on a Minister should always be expressly defined in clear language by the statute which confers it: when discretion is conferred, its limits should be defined with equal clearness."<sup>17</sup> This principle is, if anything, of even greater importance in Britain than it is in this country, for it is only with reference to the legislative limitations upon delegations of power that judicial control there can be asserted, through the application of the doctrine of *ultra vires*. Where the powers delegated confer so wide a discretion upon the Executive that it is almost impossible to know what limits the legislature did intend to impose, then there can be, to all practical intents and purposes, no effect-

<sup>17</sup> Report of the Committee on Ministers' Powers (Cmd. 4060, 1932) 65.

tive judicial control. The *vires* have become so broad as to cover almost all Executive action.

"Delegated legislation," used in the sense of the exercise by a subordinate authority, such as the head of a government department, of legislative power delegated to him, is, as has been indicated, a not unfamiliar device in this country. "The promulgation of general regulations by the executive, acting under statutory authority, has been a normal feature of Federal administration ever since the Government was established."<sup>18</sup> The administrative process has, indeed, been built upon delegations of legislative power. But American delegations have been of a relatively mild sort when compared with the British practice in this respect. A cursory comparison of the statute books of the two countries will make this point clear. "It is still the fashion in the United States to put a great deal of detail into legislation. A glance at any Act of Congress, particularly at a budget, is sufficient to make that clear."<sup>19</sup> Statutes containing broad delegations are the exception rather than the rule, and, except for the National Industrial Recovery Act and cases under the war power, even they canalize the delegated power within defined standards.

The use of delegated legislation in Britain, on the other hand, goes much further than anything that would be constitutionally valid on this side of the Atlantic. Unhampered by constitutional restrictions, Parliament has been able to confer whatever authority it thought necessary to enable government to make the transition from the Laissez-faire to the Public-Service State. The absence, however, of such restraining principles as the *Schechter* doctrine has led, perhaps, to a tendency to go too far in the conferring of such powers.

The British statute books abound with examples of delegations

<sup>18</sup> Report of the United States Attorney General's Committee on Administrative Procedure (1941) 97.

<sup>19</sup> Willis, *op. cit. supra* note 5, at 7.

of legislative power. "If anyone opens at random a recent annual volume of public general statutes, he will not have to turn many pages before finding a provision that His Majesty may make orders in Council, or that some public body or officer or department may make rules or regulations, contributing some addition to the substance or the detail or the working of that particular act."<sup>20</sup> Most important legislative action has thus grown dependent upon administrative sublegislation, which, as we shall see, may often be of greater importance, from the point of view of its practical effect upon the average citizen, than the enabling act.

Delegated legislation falls into two main classes: "contingent legislation"<sup>21</sup> and "subordinate legislation." The former is a type quite familiar in this country, as shown by the fact that many of the leading cases here have concerned this kind of delegation. Indeed, the very first case dealing with the subject, the *Brig Aurora*,<sup>22</sup> concerned what is still perhaps the classic American instance of such grants. The Court there sustained an Act of Congress of 1810 which gave the President the power to revive an embargo act, in regard to Great Britain or France, if either country had not, by a named day, so revoked or modified its edicts "as that they shall cease to violate the neutral commerce of the United States."

This type of delegation was also involved in *Field v. Clark*,<sup>23</sup> the next important case on the subject. The delegation at issue there, which the Supreme Court upheld, was the grant to the President of the power to suspend the provisions of a tariff act relating to the free introduction of certain products in regard to countries imposing duties which "he may deem to be reciprocally unequal and unreasonable." The principle of this case was

<sup>20</sup> Carr, *Delegated Legislation* (1921) 1.

<sup>21</sup> The term is that used in Comer, *Legislative Functions of National Administrative Authorities* (1927) 26.

<sup>22</sup> 7 Cranch 382 (U. S. 1813).

<sup>23</sup> 143 U. S. 649 (1892).

carried a step further in *J. W. Hampton, Jr., & Co. v. United States*,<sup>24</sup> which sustained the flexible tariff provision of the Tariff Act of 1920,<sup>25</sup> under which the President could raise or lower tariff rates up to fifty per cent to equalize differences in costs of production in the United States and competing countries. Yet, the comparative mildness of the type of "contingent legislation" common in this country is shown by the fact that a leading departmental witness before the British Committee on Ministers' Powers could characterize certain analogous powers there—e.g., the authority given to the Board of Trade in the various merchant shipping and patent acts to apply provisions of the acts to foreign countries on the conditions of equivalence and/or reciprocity—as cases "in which power is given to make what may be called *minor* adjustments, or adaptations."<sup>26</sup> The major premise in such cases is laid down by the legislature and the minor premise is left to the Executive—an observation that would apply equally well in the *Field v. Clark* type of case.

Most of the delegations that fall within this class are, even in Britain, not of the sort to cause constitutional alarm, for, by definition, as it were, the contingency upon which the Executive is to act has been legislatively specified. Certain examples, such as the power to appoint a date for the statute to begin to operate or to make certain mechanical alterations in existing statutes, which will be touched upon later, have proved of the greatest value. Another use of this class of delegation, and one whose further applicability might well be explored on both sides of the Atlantic, is in connection with international conventions, particularly those which provide for international reciprocity. Illustrations of these are the International Convention for the Safety of Life at Sea of 1929 and the International Load Line Convention of 1930, or, to take what are, perhaps, more topical instances,

<sup>24</sup> 276 U. S. 394 (1928).

<sup>25</sup> 42 Stat. 858, 941.

<sup>26</sup> Sir Charles Hipwood, Second Secretary to the Board of Trade, Minutes of Evidence, 250. (*Italics added.*)

the various international agreements between members of the United Nations, such as those entered into at Bretton Woods. In these cases, two main things have to be done. First, the convention must be translated into legislation in each country, and, second, provision must be made to secure that the practice does not deviate subsequently from one country to another. The general system in this field has been for the legislature to pass an act giving statutory effect to the convention, often stating its text in a schedule.<sup>27</sup> Extreme difficulty arises under this kind of statute, however, in ensuring that, for example, what Parliament says shall be done is identical with the intention of the convention or with what other countries do. Consequently, the suggestion has been made that the system of subordinate legislation by the department concerned might be utilized to a considerable extent to prevent this sort of difficulty.<sup>28</sup>

The use of delegated power in this field, if properly canalized, can clearly prove of the greatest value in giving the needed flexibility to the legislative implementation of the international agreement. But the legislative practice here may go too far. The British Air Navigation Act, 1920,<sup>29</sup> whose purpose was to give effect to the International Air Convention of 1919, can serve as an illustration of this. Under it, the extent to which the convention would be given statutory effect was left almost entirely to Executive discretion, the relevant section providing: "His Majesty may make such Orders in Council as appear to him necessary for carrying out the Convention and for giving effect thereto or to any of the provisions thereof, or to any amendment which may be made under article 34 thereof." An example of a more restrained delegation, and yet one which seems flexible enough for such cases, is that contained in the Bretton Woods

<sup>27</sup> *E.g.*, Merchant Shipping (Safety and Load Line Conventions) Act, 1932, 22 & 23 Geo. V, c. 9.

<sup>28</sup> Professor Laski, *Minutes of Evidence*, 256.

<sup>29</sup> 10 & 11 Geo. V, c. 80, § 1.

Agreements Act, 1945.<sup>30</sup> Parliament, itself, has there stated the means of legislatively implementing the relevant agreements, with a regulation-making power in the Executive to deal with their actual administration.

"Subordinate legislation," when carried to its extreme, results in what has come to be denoted as "skeleton legislation." The enabling Act contains a set of broad principles, with power in the Executive to give substantive content to the Act through departmental regulations—*i.e.*, Parliament, in Sir Leslie Scott's phrase, gives, as it were, a skeleton which has to be clothed by the appropriate ministry.<sup>31</sup> The classic example of this type of statute in Britain is the Poor Law Amendment Act of 1834,<sup>32</sup> which "really marks the beginning of the system of entrusting delegated powers of legislation to central departments of the Government,"<sup>33</sup> and has served as the model for the growth of the English administrative process. The Poor Law Commissioners appointed under that Act were given the general power to make such rules for "the management of the poor . . . as they shall think proper." This power, which was vested in the Minister of Health prior to the National Assistance Act, 1948,<sup>34</sup> has been characterized by one observer as "probably the widest to be found in all our administrative law."<sup>35</sup>

This kind of broad rule-making power may best be classified as the "blank-cheque" type, where Parliament has "given the rule-making authority a blank cheque to do anything it thought proper for securing a certain object."<sup>36</sup> Being limited only by the wide legislative object, it goes far beyond the bounds of the *Schechter* doctrine. The best examples of this class are, of course,

<sup>30</sup> 9 & 10 Geo. VI, c. 19.

<sup>31</sup> Minutes of Evidence, 130.

<sup>32</sup> 4 & 5 Wm. IV, c. 76, § 15.

<sup>33</sup> Sir William Graham Harrison, Minutes of Evidence, 34.

<sup>34</sup> 11 & 12 Geo. VI, c. 29.

<sup>35</sup> Allen, Law and Orders (1945) 107.

<sup>36</sup> Sir William Graham Harrison, *supra* note 33, at 35.

delegations of power in emergencies, but they are not uncommon in the ordinary British practice. This type of delegation is to be distinguished from its opposite number, the power to prescribe "pure machinery provisions," which supplement the legislative enactment by providing the administrative mechanism necessary to its execution. "Thus, it is left to a Department to prescribe the kind of form which an applicant or appellant must fill up, the manner of making returns and the times within which they are to be rendered, the composition, place and times of meeting, and sometimes the powers and procedure, of a tribunal authorized by statute."<sup>37</sup> Between these two main types, there are various intermediate classes, which are not susceptible of precise classification. The statement of the two extremes, however, serves to focus the problems of our inquiry. The pure machinery type of power must clearly be delegated to that branch of government which is charged with the execution of the legislative mandate. The legislature could not itself perform that function even if it were desirable; the legislative will has been sufficiently expressed in the enabling act. So much is clear from the practice on both sides of the Atlantic. But as the grant of power becomes broader, as we approach the "blank-check" type of delegation, our doubts increase. "It is here that the constitutional shoe pinches,"<sup>38</sup> for as the limits of the power conferred become less clearly discernible, so also do the possibilities of controlling the use or abuse of that power diminish.

Examples of delegations of legislative power to the Executive branch can be gathered from the earliest pages of English history. The modern practice in this field is thus not a complete novelty. The changing role of the State, necessitated by the rise of industrialism in the last century, has, however, resulted in far greater powers of subordinate legislation being conferred than any since the seventeenth century. The growing need to

<sup>37</sup> Allen, *op. cit. supra* note 35, at 46.

<sup>38</sup> Willis, *op. cit. supra* note 5, at 4.



cope with changes in the social and economic scene has led to the extension and intensification of the practice. The history of delegated legislation in Britain has been one of constant development and expansion, until, today, the undertaking of new forms of public service there would be unthinkable without the widest grants of legislative authority to the Executive.

The gradual growth of the power of the Executive, with the consequent decline in Parliamentary control, is well shown by the power of the Minister of Health to confirm housing schemes under the various housing acts since that of 1890. "Procedure by scheme is a polite term for private bill legislation by a department."<sup>39</sup> The department may draw up the scheme itself, or, as is more usual, may give effect by its confirmation to a proposed scheme submitted by some other body, usually a local authority. Under the housing acts, procedure by scheme has become the normal means of bringing about slum clearance. The Minister, in confirming a slum-clearance scheme and thus giving to it statutory effect, is doing, historically, what Parliament has always done by way of private bill legislation. The Housing of the Working Classes Act, 1890,<sup>40</sup> indeed, provided that the confirmation order of the Local Government Board (to whose functions the Minister of Health has since succeeded) was to be provisional only, and "shall not be of any validity unless and until it has been confirmed by Act of Parliament." Procedure by way of provisional order, although not as lengthy or as expensive as the ordinary private bill legislation which it was designed to replace, still involves all the formalities of a legislative act, and effective Parliamentary control is thus retained. Succeeding housing acts have seen the gradual relaxation of Parliamentary restraints; Executive discretion is substituted for legislative enactment. By Section 5 of the Housing of the

<sup>39</sup> *Id.* at 116.

<sup>40</sup> 53 & 54 Vict., c. 70, § 8 (6).

Working Classes Act, 1903,<sup>41</sup> the requirement of confirmation by Parliament was limited to those orders in which it was proposed to take land compulsorily. Cases where all parties were in agreement could be dealt with by Executive order alone. Section 24 of the Housing, Town Planning, &c., Act, 1909,<sup>42</sup> did away entirely with the requirement of legislative confirmation: "An order of the Local Government Board sanctioning a construction scheme, and authorising the compulsory purchase of land for the purpose shall, notwithstanding anything in section thirty-nine of the principal Act, take effect without confirmation."

The procedure of the 1909 Act has, in substance, been re-enacted in subsequent housing legislation, so that the Minister of Health may give statutory effect to housing schemes by his order alone. We have here a process of evolution that illustrates the gradual development of powers of delegated legislation. Parliament, faced with the need for conferring wide authority upon an Executive department, at first does so hesitantly, providing that the Executive action is to be subject to Parliamentary confirmation. This requirement is slowly departed from "until finally the department has the final say in all schemes and under all circumstances."<sup>43</sup>

No one will deny the usefulness from the point of view of the administrator of wide delegations of power. Many American administrators, to quote Dean Landis,<sup>44</sup> who have had to struggle with the problem of translating a statutory scheme into a working reality would have welcomed the power conferred by certain English delegations. We have, however, refused to allow such broad grants because of the belief that administrative efficiency is not the only end to be served. The constant conferring of wide grants of authority tends to place the delegate

<sup>41</sup> 3 Edw. VII, c. 39.

<sup>42</sup> 9 Edw. VII, c. 44.

<sup>43</sup> Willis, *op. cit. supra* note 5, at 120.

<sup>44</sup> The Administrative Process (1938) 52.

beyond any controls—the degree of control being in inverse ratio to the breadth of the power delegated.

The power to supplement legislation by Executive regulation is, it is true, one that is necessary to administration. Without it, the State could hardly hope to play the role in society that modern public opinion requires of it. One wonders, however, whether the indiscriminate granting of the regulation-making power which has become so prevalent in English legislation augurs well for future constitutional development. "The tendency to the 'skeleton' form of legislation has undoubtedly grown in recent years, and the name itself is not of very good omen for constitutional principles; for a skeleton, besides being a lugubrious object, is the very symbol of lifelessness, and bony structure does not make an organism. It is a dangerous doctrine that the legislature is concerned only with that osseous framework and is incapable of understanding the organs and the flesh and the blood—not to mention the soul."<sup>45</sup> It is so much easier for the legislature to allow the Executive to work out the details of a legislative scheme by authorizing the making of regulations to give content to the bare legislative statement of subject matter and to confer a wide, omnibus regulation-making power to cover any other points which may arise—"Regulations may be made under this Act . . . for prescribing anything which under this Act is to be prescribed" and "generally for carrying this Act into effect"—all this is so much easier than for the legislature itself to work out the detailed principles of the statutory scheme and to control the area of Executive discretion by defined standards. But is it consistent with a polity in which Parliament is supposed to be the supreme legislative organ?

We have asserted that Parliamentary grants of the rule-making power go far beyond anything in this country. A glance at some illustrative statutes will serve to show this. The Town

<sup>45</sup> Allen, *op. cit. supra* note 35, at 122.

Planning Act, 1925,<sup>46</sup> which consolidated the enactments relating to town planning, contains a very great measure of such delegation, and has been cited as the typical example of skeleton legislation. This Act, which consists of twenty-two sections and four schedules, is drafted in the most general terms. It confers extensive authority upon the Minister of Health, nearly every section conferring some power or other upon him. Nor is Executive discretion canalized by well-defined legislative standards. The exercise of many of the delegated powers is placed within the absolute subjective discretion of the Minister, the relevant provisions being phrased: "where it appears to the Minister";<sup>47</sup> "if he thinks that under the special circumstances of the case";<sup>48</sup> "where the Minister is satisfied";<sup>49</sup> "as the Minister thinks fit,"<sup>50</sup> or in language of similar import. The substantive provisions of town-planning procedure are stated in only the barest form. The Act is, as it were, a mere cadre, to be filled in by the Executive regulations. Aside from stating the subjects over which the ministerial rule-making power extends, Parliament has done little. One interested in the details of town planning would do better to consult the sublegislation rather than the enabling statute. The contents of town-planning schemes, the types of land in respect of which schemes may be made, the procedure under which schemes are to be adopted, are, with the exception of certain broad principles in the Act, to be laid down by the Minister; and the extent of delegation has not tended to diminish under subsequent town-planning enactments.<sup>51</sup> Nor are these matters, which have been delegated to Executive discretion, affairs of slight import. They touch upon one of the cardinal service

<sup>46</sup> 15 & 16 Geo. V, c. 16.

<sup>47</sup> § 1 (2).

<sup>48</sup> § 2 (4).

<sup>49</sup> § 13 (1).

<sup>50</sup> § 14 (1).

<sup>51</sup> See, for example, the most recent of these, the Town and Country Planning Act, 1947, 10 & 11 Geo. VI, c. 51.

functions of the State and involve the power to acquire land compulsorily in the execution of the legislative policy.

A role of no less concern to the modern State than that of town planner is that of insurance organizer, and here, too, the Parliamentary will has been expressed only in skeleton form. The National Health Insurance Act, 1936,<sup>52</sup> which was the principal Act until replaced by the even wider provisions of the insurance legislation of 1946,<sup>53</sup> contains, upon a cursory survey of those portions of the Act applicable to England, well over one hundred purposes for which regulations are required to be made or matters are required to be prescribed. A listing of the principal purposes for which regulations are required will show the extent to which the actual details of the legislative program have been left to Executive discretion. Some of these are:

1. To provide for matters incidental to the payment and collection of contributions. Section 21;
2. To govern the arrangements for the administration of medical benefit. Section 35;
3. To make rules with regard to the manner and time of paying or distributing and the mode of calculating benefits. Section 64;
4. To provide for the reduction, postponement, or suspension of benefits of persons in arrears. Section 65;
5. To prescribe the constitution of approved societies. Section 73;
6. To prescribe the manner of appointing representatives of insured persons to be members of insurance committees. Section 91;
7. To prescribe the form in which the books and accounts of approved societies are to be kept. Section 101;
8. To prescribe the basis on which the valuation of the assets and liabilities of approved societies is to be made. Section 103;
9. To prescribe the form in which the books and accounts of insurance committees are to be kept. Section 117;

<sup>52</sup> 26 Geo. V & 1 Edw. VIII, c. 32.

<sup>53</sup> National Insurance Act, 1946, 9 & 10 Geo. VI, c. 67; National Health Service Act, 1946, 9 & 10 Geo. VI, c. 81.

10. To prescribe the powers and duties of the National Health Insurance Joint Committee. Section 160;

11. To prescribe the procedure for the determination of questions and disputes—*e.g.*, questions of employment. Section 161.

Anyone at all familiar with the system of insurance provided for by the principal Act will at once realize that in these delegations are contained not only mere matters of subsidiary detail, but the warp and woof, as it were, of the legislative scheme.

In addition, there is a broad, omnibus regulation-making power, of the type already referred to:

"Regulations may be made under this Act for any of the following purposes, that is to say:—

"(a) for any purpose for which regulations are expressly authorized to be made by any of the provisions of this Act;

"(b) for prescribing anything which under this Act is to be prescribed; and

"(c) generally for carrying this Act into effect."<sup>54</sup>

Another statute of this type, and one which became a *cause célèbre* in the development of English administrative law because of the attacks launched against it by Lord Hewart,<sup>55</sup> is the Local Government Act, 1929.<sup>56</sup> The wide extent of rule-making authority delegated by it to the Minister concerned is well put in the following humorous extract from the debates in Parliament during its passage:

"I want to draw attention to the variations on the theme of bureaucratic control which are in this Bill. References are made once to the following powers of the Minister: . . . The Minister 'may declare', 'may decide', 'may consult', 'may alter', 'may extend', 'may consent', 'may confirm', 'may correct', 'may formulate', 'may dispense with', 'may cause investigation into', 'may increase to 50 per cent the fees for birth, marriages or deaths'—so that he will be dealing with us

<sup>54</sup> § 167 (1).

<sup>55</sup> *The New Despotism* (1929) 53 *et seq.*

<sup>56</sup> 19 & 20 Geo. V, c. 17.

after we have gone, if unhappily we pass before the first quinquennium is over—he ‘shall give an opportunity’, and he ‘may make an equitable adjustment’. Twice references are made to ‘may have representations made’ and to ‘shall pay’. He may ‘reduce the grants’ twice. He may ‘make a report to the Ministry of Transport’ three times. He may ‘have a grievance sent to him’ three times. He may ‘have copies of agreements sent to him’ four times. He may ‘sanction’ four times. He ‘shall publish in one or more local newspapers’ four times. He may ‘consider’ five times. (Laughter) . . . He ‘may be satisfied’ five times. He may ‘appoint an arbitrator’ five times. He may ‘be applied to’ or ‘appealed to’ three times. He may ‘allow’ seven times. He may ‘hold an inquiry’ seven times. He may ‘direct’ eight times. He may ‘certify’ ten times. He may ‘make regulations’ ten times. He may ‘approve or issue new powers’ 14 times. He may ‘determine’ 20 times. There are 91 references in the Bill to the making of Orders by the Minister. That makes 231 variations on one theme.”<sup>57</sup>

One has only to add the following recent comment by an M.P. on a proposed delegation: “Indeed, if only Moses could have known this technique, he would never have committed himself to anything so precise, and occasionally so inconvenient as the Ten Commandments. When he came down from Mount Sinai he would have taken powers to make regulations.”<sup>58</sup>

It was only natural that a people as zealous as the British have heretofore been, in resisting the trend toward uncontrolled Executive power, should not have viewed wholesale delegations such as those referred to above with complete complacency. Protesting voices first became articulate after the reaction from the unprecedented grants of authority made during the First World War. The rising tide of criticism, which found expression in a number of books<sup>59</sup> as well as in caustic comments by bench

<sup>57</sup> 225 H. C. Deb. 5s., col. 852, quoted in Chien, *Parliamentary Opinion of Delegated Legislation* (1933) 61n.

<sup>58</sup> 422 H. C. Deb. 5s., col. 135.

<sup>59</sup> Hewart, *The New Despotism* (1929); Port, *Administrative Law* (1929); Robson, *Justice and Administrative Law* (1928) (Subsequent references to this

and bar, culminated in the appointment of a committee in 1929 by the then Lord Chancellor, Lord Sankey, to consider the whole subject of the delegation of powers to government departments. The Committee on Ministers' Powers (usually referred to as the Donoughmore Committee, after its first chairman) was, in the opinion of most observers, an exceptionally well-balanced, representative body. Of its seventeen members, six were members of Parliament; five were practicing barristers. Of the rest, two were civil servants with broad administrative experience, Sir Warren Fisher being at that time head of the Civil Service; one had been government whip in the Lords; the chairman, the Earl of Donoughmore, was a member of the Privy Council; and the "inclusion of Professor Holdsworth ensured the accuracy of the historical background, that of Professor Laski ensured the acute criticism of ideas too complacently held."<sup>60</sup> The Committee heard much evidence, including some twenty-one days of oral testimony, and its report, which was published in 1932, is still the leading study in the field.

The terms of reference of the Committee were "to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (a) delegated legislation and (b) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law,"—"in other words the questions were whether Britain had gone off the Dicey standard and, if so, what was the quickest way back."<sup>61</sup>

These terms of reference have been strongly criticized by some as tending so to tie the work of the Committee to the "miscon-

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work are to the 2d edition, 1947); Robinson, *Public Authorities and Legal Liability* (1925); Allen, *Bureaucracy Triumphant* (1931), containing a reprint of earlier articles; Carr, *Delegated Legislation* (1921).

<sup>60</sup> Carr, *Concerning English Administrative Law* (1941) 26.

<sup>61</sup> *Ibid.*



ceptions and myopia"<sup>62</sup> of the great Victorian scholar as to preclude effective results in terms other than the usual Diceian bromides. "In the Never-never Land of legal formalism it may well be that phrases coined some fifty years ago by way of incisive generalisation for the use of undergraduates should pass as unalterable canons of good government. But to fetter thus the investigations of a committee appointed to probe behind legal fictions, to demand that whatever the evidence put before them, whatever the social requirements of the time, they should pay homage to a facile generalisation, is to determine beforehand both findings and recommendations. With such terms of reference constructive suggestion was not to be expected."<sup>63</sup>

We have already touched upon the weakness of Dicey's analysis. But to conclude, as some do, that because his principles are imperfectly articulated they can be "ignored"<sup>64</sup> is to lose sight of the fundamental truth which they contain for the prophylaxis of Executive power. One might, on the contrary, ask how any analysis of the administrative process that has as its end the maintenance of our common-law polity can proceed on the basis of any other terms of reference, unless it be that of "public policy" as a substitute for "law."

As Professor Davison has pointed out: "It has been often said of the report of the British Lord Chancellor's Committee on Ministers' Powers . . . that it was a finding of 'Not Guilty' with the admonition to the departments concerned not to do it again."<sup>65</sup> To an American, perhaps the outstanding weakness of the Donoughmore Committee Report lies in what seems to be its *raison d'être*; namely, to allay the widespread alarm caused by Lord Hewart's indictment. The need for a unanimous report to accomplish this appears to have led to the inevitable compro-

<sup>62</sup> Frankfurter, Foreword, 47 Yale L. J. 515, 517 (1938).

<sup>63</sup> Willis, *op. cit. supra* note 5, at 176.

<sup>64</sup> Jennings, *The Law and the Constitution* (3d ed. 1946) 288.

<sup>65</sup> "Administrative Technique—The Report on Administrative Procedure" 41 Col. L. Rev. 628 (1941).

mise at disputed points. It is true, says the Committee, that there is some validity in Lord Hewart's charges. "We regard . . . the Lord Chief Justice's book as a warning against possible dangers of great gravity towards which he discerns an existing tendency to drift. We are very much alive both to the presence of such dangers and to their gravity if not checked, and have considered them throughout our inquiry."<sup>66</sup> On the whole, however, there is no ground for alarm. "We see nothing to justify any lowering of the country's high opinion of its Civil Service or any reflection on its sense of justice, or any ground for a belief that our constitutional machinery is developing in directions which are fundamentally wrong."<sup>67</sup> In the words of an acute American observer, with regard to the work of the Committee: "Politically its handling of the matter was plausible. The administration emerged unscathed; the Committee established itself as well-balanced, olympian and judicious."<sup>68</sup>

The Donoughmore Committee reported in 1932. Almost ten years later, a leading observer could say that "the recommendations of the committee have received scant attention,"<sup>69</sup> and, although some steps have been taken since that time in line with its views, even today many of its suggestions remain unacted upon. This fact, when taken in comparison with the effect which has been given to the Report of the United States Attorney General's Committee on Administrative Procedure in the comparatively short time since its issue, serves to place the development of English administrative law in a most unfavorable light. True it is that Lord Hewart's bogie of an insidious conspiracy by the Civil Service to acquire illicit power "is to those who know the facts so remote from life as to be almost laughable."<sup>70</sup> But the

<sup>66</sup> Report of the Committee on Ministers' Powers, 7.

<sup>67</sup> *Ibid.*

<sup>68</sup> Jaffe, "Invective and Investigation in Administrative Law" 52 Harv. L. Rev. 1201, 1220 (1939).

<sup>69</sup> Carr, *Concerning English Administrative Law* (1941) 175.

<sup>70</sup> Sir Maurice L. Gwyer, *Minutes of Evidence*, 1.

• persistent refusal of successive governments to pay more than lip service to the comparatively mild proposals of a committee, biased if anything in favor of administration—with the few concessions that have been made having been of the grudging, “pulling-teeth” variety—these do not speak well for the success of attempts to canalize the English administrative process in subordination to law.

The Donoughmore Committee Report begins by upholding the practice of delegation as such, as a means of enabling the State to perform its social-service functions. “We do not agree with those critics who think that the practice is wholly bad. We see in it definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way.”<sup>71</sup> Relying upon the classic reasons for delegation—pressure on Parliamentary time, technicality of subject matter, unforeseen contingencies, flexibility, opportunity for experiment, and emergency needs—the Committee’s conclusions here rest upon the belief that the process of delegation is inevitable. “But in truth whether good or bad the development of the practice is inevitable. It is a natural reflection in the sphere of constitutional law, of changes in our idea of government which have resulted from changes in political, social, and economic ideas, and of changes in the circumstances of our lives which have resulted from scientific discoveries . . . . The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires.”<sup>72</sup>

The reliance upon delegation as an instrument of Executive power has thus become an established feature of the British polity. Nor does this state of affairs seem likely to decrease in the light of recent political developments. The leaders of the present Government are firm believers in the efficacy of dele-

<sup>71</sup> Report, 4.

<sup>72</sup> *Id.* at 5, 23.

gated legislation as a means of bringing about the program of social and economic reforms to which they are committed. The "practice of Parliament delegating legislation and the power to make regulations, instead of being grudgingly conceded, ought to be widely extended, and new ways devised to facilitate the process."<sup>73</sup> The trend under the Labor Government can be gathered from the remarks of Mr. Herbert Morrison, then Home Secretary, in 1944. "I suggest," said he, "that we shall have to conceive our legislative measures on lines of broad principle and of finance, so that Parliament can express its will on fundamentals . . . . Then Parliament must be prepared to leave to the executive the task of working out the details, within the policy Parliament has approved, and implementing them by means of departmental regulations and orders. This means, and we have to face the fact, that we may have to accept in peace-time rather more use of delegated legislation than we had before the war."<sup>74</sup>

Few will quarrel with the broad generalization that legislative time should not be overspent on the consideration of comparatively unimportant details which can safely be left to others. But, as an editorial in *The London Times* aptly pointed out in commenting upon Mr. Morrison's observations: "The concrete difficulty is to distinguish where the broad principles end and the minor issues begin; the border line is as hard to draw as any European frontier."<sup>75</sup> In a sense, all sublegislation involves the Executive filling in of details. When the delegation is so broad that the legislative mandate is a mere skeleton, however, we seem clearly to have passed to the other end of the principle-detail penumbra.

Inexact though the dichotomy based on principle and detail may be, it has nevertheless served as one of the basic guides in

<sup>73</sup> Note by Miss Ellen Wilkinson on Delegated Legislation, concurred in by Professor Laski, *id.* at 137.

<sup>74</sup> *The Times* (London), March 6, 1944, p. 2, col. 3.

<sup>75</sup> March 9, 1944, p. 5, col. 2.

British theories concerning the proper scope of delegation. The Committee on Ministers' Powers, in seeking to distinguish the *normal* from the *exceptional* practice of Parliament in this respect, found that the *normal* type of delegated legislation had two distinctive characteristics, one positive and the other negative. The positive characteristic is that the limits of the delegated power are defined so clearly by the enabling act as to be made plainly known to Parliament, to the Executive, and to the public, and to be readily enforceable by the judiciary (*i.e.*, the *Schechter* doctrine regarding the canalization of the delegated power by defined standards). The negative characteristic is that powers delegated do not include authority to do certain things; namely (1) to legislate on matters of principle or to impose taxation (*i.e.*, the principle-detail dichotomy); (2) to amend acts of Parliament, either the act by which the powers are delegated or other acts.<sup>76</sup> As its example of this type of delegation, the Committee gave the Road Traffic Act, 1930.<sup>77</sup> This is often pointed to as the model instance of the delegation of sublegislative authority, for though extensive rule-making powers are granted to the Minister of Transport there are sufficient Parliamentary prescriptions of detail to ensure that their exercise by the delegate will not be an uncontrolled one.

As opposed to this *normal* type, the Donoughmore Committee listed four *exceptional* classes of delegated legislation with regard to which special vigilance was urged:

- (i) Instances of powers to legislate on matters of principle, and even to impose taxation;
- (ii) Instances of powers to amend Acts of Parliament, either the Act by which the powers are delegated, or other Acts;
- (iii) Instances of powers conferring so wide a discretion on a Minister, that it is almost impossible to know what limit Parliament did intend to impose;

<sup>76</sup> Report, 30.

<sup>77</sup> 20 & 21 Geo. V, c. 43.

(iv) Instances where Parliament, without formally abandoning its normal practice of limiting delegated powers, has in effect done so by forbidding control by the Courts.<sup>78</sup>

To these types of delegation, there can be no American parallels, except in very mild form—such is the power of the Fourteenth Amendment.<sup>79</sup> Yet it is precisely these powers that most interest the American observer, for they indicate the extent to which the British practice has gone.

The first of these exceptional instances is based upon the principle-detail classification referred to above. As a remarkable example of the power to legislate on matters of principle, the Committee referred to the Poor Law Amendment Act, 1834, which we have already mentioned. Our other instances of extreme delegations under "skeleton legislation" may also serve as illustrations of steppings over the line from the field of mere detail to that of principle. An even better example is the Factories and Workshops (Cotton Cloth Factories) Act, 1929.<sup>80</sup> Faced with the problem of giving statutory effect to a highly technical report of a departmental committee appointed to consider the use of artificial humidity in cotton-cloth factories, Parliament (not without the protests of some, it is true) simply left the whole matter to Executive discretion, providing merely that the "Secretary of State may make regulations for the purpose of giving effect to the recommendations contained in the Report."<sup>81</sup> An absolute discretion was thus left to the Secretary about which recommendations he should embody in his regulations, although there seems to be no valid reason why Parliament could not have given free play to the Executive expertness and at the same time have retained the ultimate control by deferring

<sup>78</sup> Report, 31.

<sup>79</sup> Willis, *op. cit.* *supra* note 5, at 8.

<sup>80</sup> 19 & 20 Geo. V, c. 15.

<sup>81</sup> § 1 (1). There are similar provisions in earlier statutes dealing with the same subject. Cotton Cloth Factories Act, 1911, 1 & 2 Geo. V, c. 21, § 1; Cotton Cloth Factories Act, 1897, 60 & 61 Vict., c. 58, § 1.

the legislative implementation of the Committee proposals until after the ministerial decision about which recommendations should be adopted. This seems to be borne out by the subsequent enactment of the departmental regulations in statutory form. It is difficult to see why, in Dr. Allen's words, they could not have been enacted in this form in the first instance, or why, if they were "too technical" for Parliament in 1929, as seems to have been supposed, they ceased to be so in 1937.<sup>82</sup>

Perhaps the best examples of delegations of the power to tax are to be found in the field of customs legislation. As Sir Cecil Carr points out: "It is hard to see how a tariff system can be operated without delegation."<sup>83</sup> And it is for this reason that many of the controversial delegation cases in this country have arisen in this field. Yet the American practice in this respect is comparatively mild. Our customs legislation is still among the most detailed in the statute book<sup>84</sup> (one thinks, indeed, that Congress goes too far in this respect), and even where legislative power is delegated—for example, to alter the duty in order to protect domestic products by equalizing the differences in costs of production, or in order to give effect to reciprocal arrangements with foreign countries—even here Executive discretion must be exercised within the definite standards of the relevant tariff act.<sup>85</sup>

In the early 1930's, due to the general economic crisis, Britain was confronted with the necessity of revamping her entire tariff structure. The generous policy which had sufficed for a century was no longer adequate for a nation striving to maintain its economic position among the great powers. A ready instrument was at hand to accomplish the necessary revision in the delega-

<sup>82</sup> Allen, *op. cit. supra* note 35, at 122.

<sup>83</sup> Carr, *Concerning English Administrative Law* (1941) 40.

<sup>84</sup> Thus, the Tariff Act of 1930 (46 Stat. 590), to take one example, occupies nearly 200 pages in the statute book, and contains over 3,200 dutiable items.

<sup>85</sup> See, e.g., *J. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394 (1928); *Field v. Clark*, 143 U. S. 649 (1892).

tion of powers to the Executive. The pressure of emergency, the technicality of the subject matter, and the need for flexibility—all the traditional elements for bringing delegated legislation into play—were present to an extent unprecedented except in wartime. We in America have only gradually molded the technique of Executive discretion over the tariff structure and, as has been indicated, only in a comparatively mild form. Were we faced with the sudden necessity of overhauling our traditional customs policy to the extent that Britain was—*i.e.*, of imposing a general ad valorem duty, as against a prior general free-trade policy—one doubts whether we, too, could have achieved that end without a relaxation of constitutional doctrine on delegation, much like that which has been permitted under the war power. Yet one may question whether Britain did not go too far here in giving free rein to Executive discretion. The argument of response to urgency and flexibility which can be urged in favor of the English practice can be carried too far. The American "Constitution as a continuously operative charter of government does not demand the impossible or the impracticable,"<sup>86</sup> and there are numerous cases to show that our courts will relax constitutional principles in response to reasonable attempts to cope with emergencies.<sup>87</sup> As we shall see, however, judicial control prevents the conferring of authority upon the Executive beyond the necessities of the case.

The relevant legislation in England, on the other hand, amounted to a virtual surrender to the Executive of the Parliamentary power over the tariff structure.<sup>88</sup> The first act in this direction, the Abnormal Importations (Customs Duties) Act, 1931,<sup>89</sup> was a direct response to the economic emergency, and, although broad in scope—it empowered the Board of Trade, with the concurrence of the Treasury, to impose customs duties up to

<sup>86</sup> *Yakus v. United States*, 321 U. S. 414, 424 (1944).

<sup>87</sup> See *infra* p. 340 *et seq.*

<sup>88</sup> See Carr, *Concerning English Administrative Law* (1941) 40.

<sup>89</sup> 22 & 23 Geo. V, c. 1.



- 100 per cent of value—it was limited in duration, the Act being in force for a six months' period only. The Import Duties Act, 1932,<sup>90</sup> however, which is the general enabling act in this field and is, supposedly, an attempt to deal with the normal situations arising, contains no such time limit. That Act imposed a general ad valorem duty of ten per cent on all imported goods other than those which were exempted. The Treasury was given the power both to impose additional ad valorem duties and to alter the exempted list (though limited by the general principle of imperial preference which was contained in the Act). Supplementary duties could be imposed upon the recommendation of the Board of Trade in the case of foreign countries that discriminated against British goods. Some measure of legislative control was retained by the provision for the lapsing of orders imposing additional duties unless affirmatively approved by resolution of the House of Commons within twenty-eight days, and the Treasury was to act only upon the suggestions of the Import Duties Advisory Committee, constituted under the Act. This is strikingly similar to the work of the United States Tariff Commission in making recommendations upon which the President acts in revising our tariff structure. But there is a great difference in the degree of delegation, for the presidential power can be exercised only in line with the contingencies provided for in the relevant statute. Executive discretion under the English Act, on the other hand, is almost unlimited and the delegation is described by the Donoughmore Committee as "obviously one of the most important . . . Parliament has ever made."<sup>91</sup>

The consideration of the second exceptional type of sublegislative authority, namely, of powers to amend acts of Parliament, brings us to that class of English delegated legislation which has received the most attention on both sides of the Atlantic (such

<sup>90</sup> 22 & 23 Geo. V, c. 8.

<sup>91</sup> Report, 36.

is the force of an apt descriptive tag)—*i.e.*, the so-called “Henry VIII clause.” But first a word about some lesser delegations of the amending power. Some of these have been briefly touched upon in connection with “contingent legislation,” and we saw there that delegations similar in kind, if not in degree, are not unknown in this country, as well.

This milder type of grant of the authority to alter statutes can best be illustrated in the manner used by John Willis in explaining the terms used in the chronological table at the back of each annual volume of Statutory Instruments (the British counterpart of our Federal Register) of acts of Parliament affected by Statutory Instruments during the current year “by way of amendment, application, extension, restriction, commencement, or repeal.”<sup>92</sup> Taking them, as he does, in inverse order of constitutional importance, we can see that not all delegations of the amending power reach the degree of intensity of the “Henry VIII clauses.”

“Commencement” refers to what Sir Cecil Carr has aptly described as the “press-the-button procedure,” which vests in the Executive the authority to appoint a date for the coming into operation of the statute—“the legislature provides the gun and prescribes the target, but leaves to the executive the task of pressing the trigger.”<sup>93</sup> The grant of this bare power can prove of the greatest value, especially in those cases of international conventions, already referred to, which are based upon international reciprocity.

A large proportion of the orders listed in the table are concerned with the “application” of existing statutes. The general practice is for Parliament to grant to the Executive the task of applying the relevant English legislation to other British possessions. A good example of this is contained in the United States of America (Visiting Forces) Act, 1942,<sup>94</sup> under which, in general,

<sup>92</sup> Willis, *op. cit. supra* note 5, at 160.

<sup>93</sup> Carr, *Concerning English Administrative Law* (1941) 42.

<sup>94</sup> 5 & 6 Geo. VI, c. 31.

Britain relinquished criminal jurisdiction over members of the American armed forces in the United Kingdom. Parliament could itself have legislated on the subject with regard to other British possessions, but the detailed application of the Act with respect to the various territories concerned would have consumed too much of the legislative time. Then, too, there was a need for such legislation only in certain British possessions; *i.e.*, those where American forces were stationed. Rather than pass a great number of special acts on the subject, with the necessity for legislation with each new American "invasion" of British territory, Parliament preferred to delegate to the Executive the power of applying the Act. "His Majesty may by Order in Council direct that the foregoing provisions of this Act shall, subject to such adaptations and modifications as may be specified in the Order, have effect in any colony or in any British protectorate or in any [mandated] territory . . . , in like manner as they have effect in the United Kingdom."<sup>95</sup>

Delegations such as these can contain no cause for constitutional alarm and are undoubtedly of the greatest value in the British system. The same is true of certain, as it were, mechanical powers of amendment or repeal. These are often needed with changes in the political structure of various parts of the British Empire. Thus, "in 1920 the British Parliament granted a large measure of autonomy to Northern Ireland in a controversial atmosphere. Existing statutory references to Ireland as a whole had to be converted into references to Northern Ireland, the new governmental unit. Any mention of the Supreme Court of Ireland would have to mean the Supreme Court of Northern Ireland, the *Dublin Gazette* would become the *Belfast Gazette*, and so forth. Power was given to adapt previous Acts for this purpose by Order in Council. One highly expert draftsman worked at nothing else for many months; orders were still being made for a year or two

<sup>95</sup> § 3 (1).

after the Act was passed, and points of difficulty are appearing twenty years later."<sup>96</sup>

As we consider some of the wider delegations under the other categories listed in the Statutory Instruments table, however, more difficulty arises. The line is well illustrated by the "extension-restriction" category—cases of sublegislative power to widen or narrow the scope of an act. The grant of authority to vary a statutory classification—be it of a schedule of poisons,<sup>97</sup> weights and measures,<sup>98</sup> deleterious liquors,<sup>99</sup> noxious or offensive gases,<sup>100</sup> or any other goods<sup>101</sup>—is inevitable from the point of view of the practical working of the statutory scheme. "Why should Parliamentary time be occupied with the passing of a new Act merely because the doctors have come to the conclusion that ecgonine and heroin ought to be added to the statutory schedule of poisons?"<sup>102</sup>

Delegations of this kind are common, too, in this country, with the limitation that the *vires* must be clearly set out in the enabling act, so that the power granted may be judicially controlled. The danger upon which Mr. Justice Holmes rested his decision in the leading case of *Waite v. Macy*,<sup>103</sup> that the Executive might tend to enlarge the powers given to it by statute and cover a usurpation by calling its action one within the powers delegated—and the consequent need to prevent that result by the legislative formulation of clear-cut standards—is exemplified in the English case of *Attorney-General v. Brown*,<sup>104</sup> usually

<sup>96</sup> Carr, Concerning English Administrative Law (1941) 45.

<sup>97</sup> Sale of Poisons Act, 1868, 31 & 32 Vict., c. 121.

<sup>98</sup> Weights and Measures (Metric System) Act, 1897, 60 & 61 Vict., c. 46.

<sup>99</sup> Intoxicating Liquor (Licensing) Act, 1872, 35 & 36 Vict., c. 94.

<sup>100</sup> Public Health (Smoke Abatement) Act, 1926, 16 & 17 Geo. V, c. 43.

<sup>101</sup> Cf. *Rex v. Minister of Labour*, [1932] 1 K. B. 1; *Leonard v. Redbrook Tinplate Co.*, [1930] 1 K. B. 643, on the ministerial power to extend certain statutes to trades not then covered by them.

<sup>102</sup> Carr, Delegated Legislation (1921) 9.

<sup>103</sup> 246 U. S. 606 (1918).

<sup>104</sup> [1920] 1 K. B. 773.

called the "Pyrogallic Acid Case." Section 43 of the Customs Consolidation Act, 1876,<sup>105</sup> provided that: "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by Proclamation or Order in Council." Relying upon this statutory authority, a proclamation was issued in 1919 prohibiting, among other things, the importation of "chemicals of all descriptions" except under license, and the defendant was prosecuted for importing pyrogallic acid without the required permit. Now, it would seem obvious to even the most untutored reader that the statutory authorization was intended to apply only to goods of the same kind as those others which are expressly mentioned (and, indeed, the *ejusdem generis* rule would appear to be a fundamental one in the formulation of standards to canalize delegations of the power to vary statutory classifications). But Sir Gordon Hewart, who was the Attorney-General at that time, arguing for the Crown, asserted that the "section on its true construction gives the Crown power to prohibit the importation of goods of any kind whatsoever."<sup>106</sup> To complaints about the tremendous breadth of the authority thus contended for, he put what has since become the stock answer of those who see no danger in Executive power being left uncontrolled (and this is quite ironic in view of his subsequent condemnation of similar apologists): "The Government could be relied upon to see that the power was reasonably exercised."<sup>107</sup> Sankey, J., however, had no difficulty in holding the Executive action illegal, being of the "opinion that the *ejusdem generis* rule must be applied."<sup>108</sup>

From a strictly legal point of view, it is true, as the learned judge pointed out,<sup>109</sup> that the Crown's argument that the Executive could be trusted begs the question, for the court could concern itself only with the bare issue of the possession of the

<sup>105</sup> 39 & 40 Vict., c. 36.

<sup>106</sup> [1920] 1 K. B. 775.

<sup>107</sup> *Id.* at 779.

<sup>108</sup> *Id.* at 799.

<sup>109</sup> *Id.* at 791.

claimed power, and not with whether it would be reasonably exercised. From a broader point of view, however, Sir Gordon's contention is the very pith of our inquiry. He, himself, indeed, was among the first to see this in his later attacks.<sup>110</sup> The good intentions of the delegate are irrelevant in any discussion on the extent of delegation. Power controlled by law is a vital instrument for the performance by the State of its public-service functions. But unrestrained power, by its very nature, even in the best of hands, contains within itself the seeds of absolutism. "All power tends to corrupt; absolute power corrupts absolutely." That, at any rate, is the basic principle upon which our polity has always operated.

With the sublegislative power directly to amend an act of Parliament, other than in those comparatively harmless cases mentioned above, we have clearly passed the line of what would be constitutionally valid in this country. The extreme form of such delegation is the "Henry VIII clause"—"named after that monarch in disrespectful commemoration of his tendency to absolutism."<sup>111</sup> These clauses, in effect, confer power upon the Executive to modify the provisions of the enabling act so far as may appear to it to be necessary for the purposes of bringing the act into full operation. Their extent can be gathered from the following judicial comment upon what is perhaps their broadest example, the Rating and Valuation Act, 1925:<sup>112</sup> "Section 67, sub-s. 1, provides: 'If any difficulty arises in connection with the application of this Act to any exceptional area, or the preparation of the first valuation list for any area'—these are words of remarkable comprehensiveness—'or otherwise in bringing into operation any of the provisions of this Act,' the Minister of Health may do a series of remarkable things. He 'may by

<sup>110</sup> Hewart, *op. cit. supra* note 55, at 13, 50. Cf. the remarks of Wills, J., in *Stiles v. Galinski*, [1904] 1 K. B. 615, 625.

<sup>111</sup> Allen, *op. cit. supra* note 35, at 100.

<sup>112</sup> 15 & 16 Geo V, c. 90.

order remove the difficulty.' The imagination fails to contemplate at one view the extent and variety of the power which is given to the Minister under those words. He may by order remove the difficulty. He may cut the Gordian knot in any way that seems best to him. He may 'declare any assessment committee to be duly constituted'; he may 'make any appointment, or do any other thing, which appears to him necessary or expedient for securing the due preparation of the list or for bringing the said provisions into operation.' The legislature, not content with arming the Minister with these remarkable and varied and far-reaching powers, goes on to provide that 'any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient.' For what purpose? For carrying the Act into effect? Not at all—'for carrying the order into effect.' This, I think, though I say it with some hesitation, may be regarded as indicating the high-water mark of legislative provisions of this character."<sup>113</sup>

The Committee on Ministers' Powers cited some nine modern acts, dating from the Local Government Act, 1888, which contained this type of clause.<sup>114</sup> In the first few such statutes, the delegated power was much more limited in scope than in the more recent examples—the authority conferred being limited to one specific part of the statutory scheme; e.g., difficulties arising with respect to the holding of the *first* parish meeting or the *first* election of parish or district councilors.<sup>115</sup> Yet, as against this limitation in scope, it is to be noted that one of them, the Local Government Act, 1894, vested the power delegated not in a government department, but in a local authority not responsible to

<sup>113</sup> *Rex v. Minister of Health; Ex parte Wortley Rural District Council*, [1927] 2 K. B. 229, 236, per Lord Hewart, C.J.

<sup>114</sup> Listed in Annex II to the Report. Other examples of the power to remove difficulties, though not as strong as those listed by the Committee, are contained in the Poor Law Act, 1927, 17 & 18 Geo. V, c. 14, § 13, and the Military Service Act, 1916, 5 & 6 Geo. V, c. 104, Sched. II, 6.

<sup>115</sup> Local Government Act, 1894, 56 & 57 Vict., c. 73, § 80.

Parliament, which was enabled to act without so much as informing either Parliament or the relevant department, the Local Government Board. The wider type of power—that generally to amend the act in question—first appears in the National Health Insurance Act, 1911,<sup>116</sup> and has been substantially re-enacted in all subsequent examples, culminating in the Local Government Act, 1929.<sup>117</sup> In only two of them was the delegated power subject to any direct Parliamentary control: the Rating and Valuation Act, 1925, providing that orders under it might be annulled by resolution of either House, and the Local Government Act, 1929, providing for their expiration after three months unless affirmatively approved by resolution of each House. The powers of general amendment which have been conferred since the 1911 Act have been limited in duration by the enabling acts, the periods specified for their exercise varying from the usual limit of one year to over three years in the case of the Rating and Valuation Act, 1925.

In general, the "Henry VIII clause" is to be found in statutes which have either enacted some far-reaching scheme of administrative reform or have created some entirely new piece of State machinery. The Local Government Act, 1929, is an example of the first group, the National Health Insurance Act, 1911, of the second. The value to the administrator of such a clause in cases like these seems obvious. "It is clear that in legislation of this kind, no matter how careful and exact the preliminary work may have been, it is practically impossible not to overlook some special or exceptional cases which ought to have been dealt with, or to foresee every difficulty which may arise in the course of bringing into operation a new and complicated administrative machine."<sup>118</sup> The task of translating the statutory scheme into practical reality is greatly facilitated by the power to deal with

<sup>116</sup> 1 & 2 Geo. V, c. 55, § 78.

<sup>117</sup> 19 & 20 Geo. V, c. 17, § 130.

<sup>118</sup> Sir Maurice L. Gwyer, Minutes of Evidence, 2.



unforeseen contingencies arising out of the execution of the legislative program without the need of statutory amendment. But English administrators have gone further and claimed that the carrying out of the legislative policy in these cases would have been impossible without the broad power conferred. To quote the answer of a leading department witness before the Donoughmore Committee when asked whether Section 130 of the Local Government Act, 1929, had not gone too far: "No, not a bit . . . We had a similar section in the Insurance Act of 1911, and I drafted many Orders under that Section, and it is literally true that the Act could never have started at all but for the power reserved to the Insurance Commissioners by that Section."<sup>119</sup>

The consensus of departmental opinion before the Donoughmore Committee was, therefore, that the "Henry VIII clause" was a "regrettable necessity."<sup>120</sup> The Committee, though accepting the "regrettable," remained unconvinced concerning the "necessity" for delegating such authority. The argument that effective administration would be impossible without the power was disposed of by citing the numerous cases where it had not been conferred. "It is significant that the so-called 'Henry VIII clause' has not been included in all statutes where, upon the arguments advanced in its favour, it might have been used. For example, no such provision is to be found in the Land Drainage Act, 1930, which provides for the reorganisation of a complicated system of local administration dating from the Middle Ages. If it has been found possible to bring certain important and complicated legislative schemes into operation without such a power, relying upon the ordinary method of an amending Bill in Parliament to meet unexpected contingencies, it is not clear why other enactments . . . cannot similarly be dealt with."<sup>121</sup>

<sup>119</sup> *Id.* at 29.

<sup>120</sup> Sir Arthur Robinson, Secretary to the Ministry of Health, *id.* at 144.

<sup>121</sup> Report, 60.

The proponents of the power have surely overstated their case with regard to the impossibility of effective administration without the "Henry VIII clause." The experience on this side of the Atlantic, where far-reaching schemes of social reform have been administered *minus* anything even approaching the "Henry VIII" dispensing power, as well as the many English examples of successful administration in its absence, serve to show that the claimed impossibility existed only in the mind of the overcautious civil servant. It is true that the nonexistence of the broad power might cause some measure of delay in the operation of large schemes of social reform. This, however, is, in the Donoughmore Committee's phrase, a price well worth paying in the light of the dangers inherent in the power.<sup>122</sup> The Committee, although not recommending the total abolition of the "Henry VIII clause," did suggest that its use "should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the Bill."<sup>123</sup> In practice, the recommendation has meant the virtual abandonment of the clause. "It has not been used since the Report, and in various big and complicated Acts since 1932, such as the Local Government Act, 1933, and the Public Health Act, 1936, the Executive has achieved what it declared to be impossible."<sup>124</sup> All of which demonstrates that the prior departmental claims were based not so much upon the asserted necessity as upon administrative convenience, certainly not a sufficient reason for the grant of a power of such tremendous breadth.

The doctrine enunciated by the Supreme Court in the *Schechter*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Id.* at 65.

<sup>124</sup> Allen, *op. cit. supra* note 35, at 102. Something very like the "Henry VIII clause," however, appears in Section 12 of the Representation of the People Act, 1945, 8 & 9 Geo. VI, c. 5, which authorizes the making of orders, which are to "have effect notwithstanding anything in any enactment (including an enactment contained in this Act), or anything in any instrument made by virtue of such enactment." Cf. Local Government Act, 1948, 11 & 12 Geo. VI, c. 26, §§ 109, 110.

case seems to be implicit in the Donoughmore Committee's third category of exceptional delegated legislative powers; *i.e.*, where the discretion conferred is so wide that it is almost impossible to know what limit Parliament did intend to impose. In a sense, both the power to sublegislate on matters of principle and that granted under the "Henry VIII clause" fall within this category, for in neither of them are the *vires* clearly defined. Thus, the Poor Law Amendment Act of 1834, which we have already considered, is given as a good illustration of this type. The Patents, Designs and Trade Marks Act, 1888,<sup>125</sup> which empowered the Board of Trade "as soon as may be after the passing of this Act, and . . . from time to time, [to] make such general rules as are in the opinion of the Board required for giving effect to this section," is another statute of this kind.

The last type of delegation which the Donoughmore Committee characterized as exceptional—that which purports to place the sublegislation beyond judicial control—is one that must at first sight seem particularly strange to the American observer. "A rule of statutory finality is unthinkable in a country where an Act may not go so far as to make the determinations of a commissioner final on questions of fact, but must go on to exclude 'jurisdictional fact' from that finality: any legislature which sought to prevent the courts from passing on the question of ultra vires would be told that by so doing it was depriving the individual adversely affected of 'due process,' of a constitutional right to challenge 'illegal usurpation of power' before the courts."<sup>126</sup>

Many English statutes, on the other hand, go much further than merely seeking to exclude questions of fact from the judicial purview. In many cases, the enabling act purports to bar all access to the courts. As the power of Parliament to exclude judicial review is clear, the problem in specific cases becomes

<sup>125</sup> 51 & 52 Vict., c. 50, § 1 (2).

<sup>126</sup> Willis, *op. cit. supra* note 5, at 8.

one of determining the legislative intent. This is usually no easy matter, for a democratically elected body will rarely, in so many words, deprive the individual of so fundamental a right. Instead, it uses some such formula as that the subordinate legislation made under the enabling act "shall have effect as if enacted in this Act," which can be interpreted either way. We are not concerned at the moment with the legal effect of such provisions. We shall see at a later point that the position here is still not wholly certain, despite judicial efforts to extend the right of review in the face of such clauses. What is of interest, especially from a comparative point of view, is the mere existence of such provisions as have at least the *prima facie* effect of elevating departmental regulations to the status of an act of Parliament, and hence beyond judicial control.

Even stronger than these provisions is what has come to be known as the "conclusive-evidence" clause, which, in the words of the Donoughmore Committee, "seems on its face to have been designed with the express purpose of completely and finally excluding all control by the Courts."<sup>127</sup> The general type is that contained in the Third Schedule of the Housing Act, 1925,<sup>128</sup> which reads: "The Minister may confirm the order and the confirmation shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act." The provision there related to the confirmation by the Minister of Health of orders for the compulsory purchase of land for slum-clearance schemes, and its effect was to make the Minister the final arbiter in such cases. This is even clearer under some of these provisions, which add that the Executive sublegislation "shall not be questioned in any legal proceedings whatever."<sup>129</sup>

<sup>127</sup> Report, 40.

<sup>128</sup> 15 & 16 Geo. V, c. 14.

<sup>129</sup> *E.g.*, Extradition Act, 1870, 33 & 34 Vict., c. 52, § 5. Willis lists some twenty-two examples of the "conclusive-evidence" clause, *op. cit. supra* note 5, at 197.

The same criticisms which have been expressed against the "Henry VIII clauses" would seem to be applicable here, though perhaps even in stronger form. Both seek to place the exercise of the delegated power beyond any controls and have proved as repugnant to many English observers as they would be in this country. The Donoughmore Committee took strong exception to the "conclusive-evidence" clause: "The clause is objectionable, and we doubt whether it is ever justified . . . . Apart from emergency legislation, we hardly think there can be any case so exceptional in nature, as to make it both politic and just to prohibit the possibility of challenge altogether."<sup>130</sup> Here, too, as in the case of the "Henry VIII clause," the strictures of the Committee seem to have had some effect, for the "conclusive-evidence" clause has not found its way into any subsequent legislation.

It would be a mistake, however, to assume that, with the abandonment of the two most extreme forms of delegation, the British practice in the field of delegated legislation has tended to approach that in this country. We have seen sufficient examples of wholesale delegations which do not fall within the two extreme categories to realize that the trend is if anything in the opposite direction. Allusion has already been made to the remarks of Mr. Herbert Morrison upon the subject, as expressing the views of the present Government. The policy of social and economic reforms to which the Labor Government is committed is now being translated into legislative action. The consequent expansion in the social-service functions of the State is being carried out through the mechanism of even larger delegations than those discussed above.

That there is some justification for greater grants of power to enable the State to perform its *operating* or *service* activities—activities which in present-day Britain bid fair to become by far the larger part of the work of government—seems clear. Even

<sup>130</sup> Report, 41, 62.

so stanch a constitutionalist as Dicey recognized this. "We must remember," said he, "that when the State undertakes the management of business properly so called, the business which hitherto has been carried on by each individual citizen simply with a view to his own interest, the Government, or, in the language of English law, the servants of the Crown, will be found to need that freedom of action necessarily possessed by every private person in the management of his own personal concerns. If a man of business were to try to conduct his own affairs in accordance with the rules which, quite properly, guide our judges in the administration of justice, he would discover that at the end of the year he had realized no profits and had come near to bankruptcy." <sup>131</sup>

The legislative implementation of socialist doctrine tends, therefore, to be accompanied by delegations at least as great as those we have discussed. The concentration of power in the instruments the Labor Government has created to operate those industries which have been nationalized has almost of necessity been more intense than under pre-existing grants. "If in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu's lines." <sup>132</sup> Governmental operation will entail much the same organization as has heretofore characterized private industry. "How could any trade prosper if it were in the hands of a man who could not dismiss a clerk until the employer had obtained conclusive proof of fraud or misconduct by the servant, or if no evidence were allowed to tell against the alleged delinquent unless it were what lawyers consider the very 'best evidence'? The management of business, in short, is not the same thing as the conduct of a trial. The two things must in many respects be governed by very different rules." <sup>133</sup>

<sup>131</sup> Dicey, "The Development of Administrative Law in England" 31 L. Q. Rev. 148, 150 (1915).

<sup>132</sup> Landis, *op. cit. supra* note 44, at 10.

<sup>133</sup> Dicey, *supra* note 131, at 148, 150.

The trend under the Labor Government is well shown by the Coal Industry Nationalisation Act, 1946,<sup>134</sup> which has served as the model for nationalizations in Britain. The instrument in which is vested the responsibility for operating the nationalized industry is the National Coal Board, which can be compared in a very general way to the government corporation in this country. The Coal Board is charged with the duties of working and getting the coal in Great Britain, securing the efficient development of the coal-mining industry, and making supplies of coal available as may seem to them best calculated to further the public interest. Their functions are to include the carrying on of all such activities as may appear to them requisite, advantageous, or convenient in connection with the discharge of their duties. The Board is given the power to do anything and to enter into any transaction which in their opinion is calculated to facilitate the proper discharge of their duties or is incidental or conducive thereto. It may thus be seen that the government operator is given the widest authority to enable it to perform its functions—at least as broad as that possessed by the prior private owners.

It would, however, not be wholly consonant with British constitutional principles to set up an independent governmental organ, free of any immediate responsibility to the legislature. The appropriate minister—the Minister of Fuel and Power—is, therefore, given wide, though not clearly defined, powers over the workings of the Coal Board. In the first place, the members of the Board are appointed by the Minister, who is also given the power to make regulations with respect to their proceedings and determinations. With regard to the actual activities of the Board, the Minister is given a general supervisory power. The Board is to act upon directions of a general character given by the Minister regarding the exercise and performance by them of their functions in relation to matters appearing to the Minister to affect the national interest. The relation here is to be compared with

<sup>134</sup> 9 & 10 Geo. VI, c. 59.

that of the President to an American government corporation. The similarity is highly suggestive. The sort of power conferred and the degree of independence are strikingly similar. A possible explanation lies in the affinity to be noted in the kind of work performed by this type of instrument in both countries. The comparatively few operating activities which the Federal Government does perform have tended to be vested in government corporations analogous to the English type, *e.g.*, the Tennessee Valley Authority, Reconstruction Finance Corporation, etc.

This is not to say, of course, that the powers conferred upon such organs in this country reach anything like the degree of intensity as those given, for example, to the British Coal Board. However inadequately expressed may be the statutory provisions concerning the relative spheres of the Board and the Minister, it is clear that, together, they possess complete discretionary authority with regard to the operation of the industry. The provisions mentioned above, which are, in substance, all that the Act contains on the actual operation, are in the most general terms. There is no articulated standard—other than that vague guide, “public interest”—and, aside from the very broad area of activity (*i.e.*, the Board’s activity is limited to the coal-mining industry), there seems to be nothing in the Act upon which judicial review can be granted.

This, then, is the model for developments in Britain. One must picture a constant increase in institutions similar to the Coal Board, with the ultimate result being a society in which the “basic” or “essential” industries and services are operated by similar State instrumentalities. Yet, as we have already stated, it is precisely here that the great danger lies. The expansion in the social-service activities of the State, with the consequent growth of governmental power, cannot but lead to an omniscient Executive, unless it be controlled by the safeguards traditional in our polity.



## CHAPTER III

### EXECUTIVE POWER IN BRITAIN:

#### 2. ADMINISTRATIVE JUSTICE

The possession of power judicial in nature has been as significant a feature of the administrative process as the sublegislative power. In this country, indeed, the determination of disputes has been the most striking part of the work of administrative agencies, and most of the controversy in the field has concerned their adjudicatory functions. "The distinctive development of our era," said Chief Justice Hughes some years ago, is "that the activities of the people are largely controlled by government bureaus in State and Nation. It has well been said that this multiplication of administrative bodies with large powers has raised anew for our law, after three centuries, the problem of 'executive justice'; perhaps better styled 'administrative justice.' A host of controversies as to private rights are no longer decided in courts."<sup>1</sup>

From a strictly logical point of view, judicial justice is not necessary for the proper determination of disputes. We can go further and assert "that law is not logically essential to the administration of justice,"<sup>2</sup> for justice may be administered, and in its early stages was administered, according to the will of the individual magistrate for the time being. Personal justice of this type tends, by its very nature, to be arbitrary. One can, perhaps, picture a wholly satisfactory dispensation by St. Louis under the

<sup>1</sup> N. Y. Times, Feb. 13, 1931, p. 18, col. 1.

<sup>2</sup> Pound, "Justice According to Law" 13 Col. L. Rev. 696 (1913).

oak at Vincennes; but who would be willing to submit his case to the unfettered discretion of other than a saint?

The trend toward Executive justice today is, in a sense, a reversion to justice without law, for the element of will or discretion is present to a great extent as the determinative factor. An administrative decision may rest as much upon the magistrate's conception of what best serves the public interest as upon the application to the case at hand of fixed legal principles. This, taken by itself, is not a fundamental defect, for the prime function of administrative agencies is to carry out the legislative policy, and the wide range given to Executive discretion enables them effectively to execute this task.

The modern resurgence of Executive justice represents a reaction from the rigidity and overformalism of the judicial justice of the last century. The traditional instruments for the settlement of disputes proved inadequate when confronted with the problems posed by the growth of governmental power caused by the rise of industrialism. The disputes arising out of the vast new State services, the newly created rights and duties growing out of the "socialization of law"<sup>3</sup>—these could not be expeditiously committed in the first instance to the ordinary courts. The judicial technique is ill-fitted for the actual determination of many of the problems arising out of these developments—problems whose solutions depend more upon policy than legal precepts. "Certain types of questions are not so suitable for decision by courts of law as by a different type of tribunal. A court of law must necessarily be guided by precedent. Its functions are first to ascertain the facts and then to apply the law to the facts as ascertained. In applying the law it must be guided by previous decisions. If it does not do this the law becomes chaotic. The whole tradition and practice of legal administration makes it extremely difficult for the judges to administer a law

<sup>3</sup> See Pound, "The End of Law as Developed in Legal Rules and Doctrines" 27 Harv. L. Rev. 195, 225 (1914).

by which the tribunal is to grant or withhold rights according as they think it just or reasonable to do so."<sup>4</sup>

It seems clear, therefore, that the grant of the authority to decide certain disputes to agencies other than the ordinary courts is not, of itself, a detrimental practice. But, here, too, as in the delegation of legislative power, the trend in this direction must be carefully watched to guarantee that it does not go too far; for many of the safeguards which we have come to associate with judicial justice are absent in the Executive determination of disputes. Much of this is inherent in Executive justice. The advantages of Executive justice—directness, expedition, freedom from the bonds of purely technical rules, and the consequent ability to give effect to the legislatively expressed policy<sup>5</sup>—can only be bought at the cost of many of the traditional checks which obtain upon our courts. Certainty and predictability, the technique of decision according to authoritative principles, and the bridling of the individual will of the magistrate by formalized rules of procedure—these must inevitably be lessened as freer play is given to Executive discretion.

It is largely for this reason that the rule of law demands some degree of judicial control over administrative determinations. The principle of Executive finality, so common in Continental systems, is basically repugnant to common-law notions on governmental power. Attempts to make administrative determinations conclusive in this country have constantly been struck down by the courts. It is true that there have been some judicially self-imposed limitations upon the right of review,<sup>6</sup> but the concept of Executive finality in the Continental sense seems impossible under our present polity. The inherent review power of the constitutional courts enables adequate judicial control to be

<sup>4</sup> Lord Greene, M.R., *Law and Progress* (Haldane Memorial Lecture, 1944) 20.

<sup>5</sup> See Pound, "Justice According to Law" 14 Col. L. Rev. 1, 24 (1914).

<sup>6</sup> See, e.g., *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943); *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401 (1940).

maintained even though the initial determination has been entrusted by the legislature to some other agency.

✓ In England, of course, there are no constitutional limitations upon the legislature, and a statutory provision for the finality of an Executive decision must be respected by the courts. Thus, Parliament may "provide that the decision of the Minister shall be final and conclusive. When this is the case, the Courts are powerless to intervene, however unjust and absurd a decision may appear to be, and even though it is obviously based on an erroneous view of the law."<sup>7</sup> The type of provision referred to can be illustrated by the following: —

"Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within 21 days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made *shall be binding and conclusive on all parties.*"<sup>8</sup>

It might be well to go into this provision somewhat further, for, although it has since been repealed,<sup>9</sup> it is a good illustration of the extreme type of judicial power conferred upon the Executive in Britain, and will serve to focus our inquiry into the problems arising out of such delegations. The Public Health Act, 1875, "was the first really determined effort to bring into existence an elaborate system of sanitation, regardless, in many ways, of private prejudices and private rights."<sup>10</sup> To carry out this purpose, great powers of a coercive nature were conferred upon the various local authorities who were largely responsible for its

<sup>7</sup> Hewart, *The New Despotism* (1929) 48.

<sup>8</sup> Public Health Act, 1875, 38 & 39 Vict., c. 55, § 268. (*Italics added.*)

<sup>9</sup> Public Health Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 49, Sched. III.

<sup>10</sup> Robson, *Justice and Administrative Law* (2d ed. 1947) 108.

administration. In general, they were given the authority, upon default of the owner, to execute any necessary sanitary construction and to recover any expenses incurred by them in the process in a summary manner. Thus, the local authority could by written notice require the owner or occupier of a house to make a covered drain connecting his house with a sewer. If such notice were not complied with, the local authority could itself do the work required and recover the expenses from the defaulting owner.<sup>11</sup> A similar method of procedure was provided with regard to "the recovery of expenditure incurred by the enforcement of provisions for securing lavatory accommodation, the examination of drains alleged to be out of order, the purification of an unwholesome house on the certificate of the medical officer, the abatement of various kinds of nuisances, the provision of a proper water supply for dwelling houses, the closing of polluted wells, the cleansing and disinfection of premises against infectious disease, and the levelling, paving, metalling and other treatment of private streets."<sup>12</sup>

Section 268, quoted above, granted a right of appeal to the relevant central government department, the Local Government Board, to those aggrieved by the decision of the local authority in such cases regarding the necessity for such works. The definition of the issues upon such appeal was, in general, obtained through communication between the department and the parties involved. When the Local Government Board (or, later, the Minister of Health, who succeeded to the Board's functions in 1919<sup>13</sup>) received the memorial of the appellant referred to in the section, they invited the observations of the local authority thereon, and a copy of these observations was transmitted to the appellant, with further correspondence taking place, if necessary. The normal procedure then was for the Board to direct the hold-

<sup>11</sup> Public Health Act, 1875, § 23.

<sup>12</sup> Robson, *op. cit. supra* note 10, citing §§ 23, 36, 41, 46, 47, 62, 70, 120, and 150.

<sup>13</sup> Ministry of Health Act, 1919, 9 & 10 Geo. V, c. 21, § 3.

ing of a public local inquiry under the power conferred by Section 293 of the Act. Such inquiries, as we shall see, play a very important role in English Executive justice. They provide about the only means for the individual orally to state his case and are roughly analogous to an administrative hearing in this country before one of the hearing officers provided for by the Federal Administrative Procedure Act. Most of the cases which arose under Section 268 raised issues of fact which could not be determined without a hearing and, although the holding of an inquiry was not obligatory, such inquiries were generally held. These inquiries were conducted by an inspector of the department with professional qualifications (usually those of a civil engineer), who was familiar with the matters, *e.g.*, drainage or street works, that formed the subject of the inquiry.<sup>14</sup>

✓ The departmental decision was then rendered upon the basis of a written report by the inspector who conducted the inquiry, such report setting out the evidence and the inspector's own recommendations. The department, in its disposition of the case, was not tied down by any legal standards, for it could "make such order in the matter as to the said Board may seem equitable." The board discretion conferred upon the Local Government Board under this language was considered by Brett, L.J., in *Reg. v. Local Government Board*.<sup>15</sup> "It seems to me obvious," said he, "from the construction of the Act that the Local Government Board have power to inquire into every circumstance however remote, which could reasonably determine the question, whether it was inequitable or not that a particular sum should be paid. If that be so, they do not inquire into former matters as decisions of the local authority, but they inquire into them as facts in order to enable them to determine upon the largest interpretation

<sup>14</sup> This summary of the procedure is derived from Committee on Ministers' Powers, Memoranda by Government Departments (1932), hereafter cited as Memoranda, 39.

<sup>15</sup> (1882), 10 Q. B. D. 309, 325.

of the word 'equitable' that can be given to it, whether the particular sum is one which it is equitable, fair, and right that the individual should be forced by the legislature to pay for works which have been done against his will; and therefore I should be loth to the extremest degree to fetter the power of the Local Government Board to inquire into every fact, which could reasonably lead them to a fair and equitable conclusion with regard to that question which is the question before them . . . . I think they ought to have the largest powers and the largest discretion to inquire into everything, to examine every fact which may lead them to a fair conclusion as between the local authority and the individual who has presented the memorial."<sup>16</sup>

The striking thing about this statutory provision, however, is not so much the wide range which it gives to Executive discretion as the conclusiveness which it purports to vest in the Executive determination. The order of the Board "shall be binding and conclusive on all parties." These are strong words, and, at least at first glance, seem to have the effect of placing the Executive decision beyond any judicial control.

The relevant language in Section 14 (3) of the Roads Act, 1920,<sup>17</sup> went even further and may be taken as the extreme instance of the conferring of judicial power upon an administrative authority.<sup>18</sup> After providing for a right of appeal from the decision of a vehicle-licensing authority refusing to grant a license for hire or granting it subject to conditions, and authorizing the Minister of Transport upon such appeal to "make such order thereon as he thinks fit," it went on to state: "An order made by the Minister under this subsection shall be final and not subject to appeal to any court, and shall, on the application of the Minister, be enforceable by writ of mandamus."<sup>19</sup>

<sup>16</sup> *Cf.* *Lancaster v. Burnley Corporation*, [1915] 1 K. B. 259, 268.

<sup>17</sup> 10 & 11 Geo. V, c. 72.

<sup>18</sup> So characterized in Port, *Administrative Law* (1929) 201.

<sup>19</sup> Repealed in part by the Road Traffic Act, 1930, 20 & 21 Geo. V, c. 43, Sched. V.

The pertinent English statutes, however, purport to exclude the right of review in so many words in comparatively few cases, although one must admit, albeit reluctantly, that there is a growing tendency in this direction, especially in disputes arising under the new State social services. Many of the statutes conferring judicial power upon the Executive simply make no provision with regard to judicial control. As we shall see in some detail at a later point, this bars all but a limited type of supervisory review by the High Court through the so-called prerogative writs—roughly similar to the narrow type of nonstatutory review available in most jurisdictions in this country. There is no right of appeal unless the statute expressly so provides, and then only to the extent that the statute allows.

In general, then, the exercise of judicial power by the Executive in Britain is subject to only limited control by the courts, for the statutes are silent in many cases upon the right of review, and, even where express provision is made, the appeal afforded does not usually extend beyond questions of law. The effect of this is to commit the determination of many important types of disputes to agencies other than the ordinary courts, and, for most practical purposes, their decision is the final one.

Many of these cases where powers of a judicial character have been conferred upon the Executive, although judicial in form, are, in their very nature, of a type which must from the point of view of effective administration be submitted to the Executive for decision. As an example of this we can cite the section of the Roads Act, 1920, referred to above, dealing with the licensing of vehicles for hire. The decision upon the merits must clearly be made by some Executive agency, if only effectively to co-ordinate the licensing policy with that governing the administration of other portions of the Act. Although that section went too far, in purporting to vest the ministerial determination with finality, thus placing it beyond *any* judicial control, provision for at least the initial Executive determination of licensing appeals was justi-



fied to ensure the co-ordinated execution of the legislative policy.

✓ This point is shown even more clearly by a survey of the many similar grants of judicial power under the Road Traffic Act, 1930,<sup>20</sup> which we have already referred to as a model of discretion, in so far as its delegations are concerned.<sup>21</sup> Section 25 of that Act empowers the Minister of Transport on appeal by any person aggrieved to order any restriction or prohibition placed on the use of a bridge by any bridge authority to be removed or varied in such manner as he may direct. Section 47 contains a similar provision with regard to roads. The Minister may, on appeal by any person aggrieved, quash any restriction or prohibition of traffic on roads imposed by a highway authority or confirm such restriction or prohibition with or without modifications, and the Minister's order is to be final and conclusive. Section 56 confers upon the Minister power upon appeal to extend the time given to any person by a highway authority to remove any structure erected on a highway. Under Section 81, he is authorized upon appeal by any person aggrieved in connection with the granting or refusal to grant or the revocation or suspension of a public-service vehicle license to make such order as he thinks fit. And by Section 102 (6) the Minister may dispose of an appeal from a decision of the Traffic Commissioners for any area upon an application by a local authority for consent to the running of public-service vehicles, and his decision upon any such appeal is final. ✓

✓ It will at once be noted that, although judicial in nature, the types of determination which are here committed to the Executive are not on all fours with those normally entrusted to the ordinary courts. Their decision depends more upon ministerial policy than upon the application of legal principles to the facts at hand. It is for that reason they have been assigned to other than purely judicial agencies. But it is quite another thing to

<sup>20</sup> 20 & 21 Geo. V, c. 43.

<sup>21</sup> *Supra* p. 48.

make the Executive the final arbiter of these disputes, as some of the above provisions purport to do. Even though a wide range of discretion has been afforded to the Minister, this does not mean that he is a free agent. Executive discretion must be exercised "on proper legal principles"<sup>22</sup>—"according to the rules of reason and justice,"<sup>23</sup> and not at the mere caprice of the magistrate. Attempts, therefore, to grant finality to administrative determinations, even in cases such as these, which are not suited for judicial decision initially, must be viewed with some misgivings, for control by the courts is an essential feature of the rule of law.<sup>24</sup> ✓

The kind of determination discussed above, such as the various examples drawn from the Road Traffic Act, has been committed to Executive decision because, being based more on policy than on law, it has proved unsuited for the judicial process. There are numerous other cases which have been committed to Executive agencies, although the type of matter dealt with more nearly approaches that with which the ordinary courts are concerned. These are the cases arising out of the social-service schemes which the State has begun to undertake—largely those concerned with the administration of State benefits. The disputes arising are so numerous that the ordinary courts are ill-fitted to determine them expeditiously. Nor are the amounts involved large enough to justify the expense and delay which resort to the judicial process would entail. It is here that we see one of the prime reasons for the recent renaissance of Executive justice. On the one hand, there is this great mass of disputes awaiting speedy solution, for the litigants' economic well-being may be dependent upon their determination. On the other hand, there is the

<sup>22</sup> *Pioneer Laundry and Dry Cleaners, Ltd., v. Minister of National Revenue*, [1940] A. C. 127, 136.

<sup>23</sup> *Sharp v. Wakefield*, [1891] A. C. 173, 179. See *Minister of National Revenue v. Wright's Canadian Ropes*, [1947] A. C. 109, 122.

<sup>24</sup> *Cf.* the remarks of Scott, L.J., in *Wilkinson v. Barking Corp.*, [1948] 1 K. B. 721, 728.

inadequacy of the traditional judicial organs, which are not geared for the "assembly-line" type of justice required.

✓The settlement of these matters has, therefore, been entrusted to the Executive. Nor has the tendency in this direction been any less striking in this country than on the other side of the Atlantic. The degree of intensity has, perhaps, not been as great, due to the comparatively narrow range of the social services provided by the State here. But such functions as old-age assistance, unemployment insurance, veterans' assistance, and the like, demonstrate that we, too, have gone far in this direction, for the disputes arising out of these functions are disposed of by administrative justice. The role of the courts in these cases has been reduced to a narrow one—at least in so far as the average citizen, seeking these State benefits, is concerned. Yet, from a broader point of view, the American judiciary plays a vital part, in guaranteeing that the justice dispensed by these Executive agencies is not arbitrary or capricious. Ultimate control by the courts is an essential, though rarely resorted to, check, for, though not concerned with the substance of the administrative determination, it ensures that it is one which was within the competence of the subordinate tribunal and that the process of decision was according to judicial standards.

The tendency in Britain, as in this country, has been to consign the cases arising out of the administration of State benefits, such as pensions and insurance, to specific Executive tribunals. This is opposed to the common practice there of confiding the settlement of disputes to the relevant minister, with the final determination being an institutional one, in the sense that it has been rendered by the departmental entity rather than by any known tribunal. The establishment of particular, known tribunals in these cases avoids many of the defects which, as we shall see, are inherent in departmental decisions, and combines the advantages of Executive justice with many of the safeguards

which we have come to associate with the traditional administration of justice.

The type of tribunal referred to can be gathered from a few examples. Under the Unemployment Insurance Act, 1935,<sup>25</sup> claims for benefit were submitted to an insurance officer appointed by the Minister of Labor. Appeals from the decision of the insurance officer were allowed within twenty-one days to a court of referees (consisting of employer and employee representatives and a chairman appointed by the Minister), and, in certain cases, there could be a further appeal by the insured to an umpire, whose decision was final. We have here an elaborate hierarchy of administrative tribunals—original, intermediate appellate, and, in some cases, ultimate appellate—to decide claims arising under the Act. Their functions were directly analogous to those performed by the ordinary courts, and they were, to all intents and purposes, the final arbiters in the field, for their decisions were placed beyond any judicial control.

A like procedure was provided for by the Widows', Orphans', and Old Age Contributory Pensions Act, 1936.<sup>26</sup> The original decision there with regard to pension claims was made by the Minister of Health (*i.e.*, a departmental decision of the type referred to above). Any person dissatisfied by the award or decision could appeal to one or more referees selected from a panel of barristers and solicitors appointed by the National Health Insurance Joint Committee, whose decision was final and conclusive. Similarly, under the National Health Insurance Act, 1936,<sup>27</sup> decisions in disputes between insured persons and insurance committees or approved societies could be appealed to referees appointed by the Minister, whose decisions were likewise final and conclusive.

The National Insurance Act, 1946,<sup>28</sup> which repeals the pro-

<sup>25</sup> 25 & 26 Geo. V, c. 8, § 43.

<sup>26</sup> 26 Geo. V & 1 Edw. VIII, c. 33, § 30.

<sup>27</sup> 26 Geo. V & 1 Edw. VIII, c. 32, § 163.

<sup>28</sup> 9 & 10 Geo. VI, c. 67, § 43.

visions referred to above, retains the same essential principle with regard to the determination of questions touching the right to benefit, although only the bare outline of the relevant procedure is given, the details being left to ministerial regulations. The regulations are to provide for the submission of such questions in the first instance to an officer appointed by the Minister. Appeals are to be taken from his decisions to a local tribunal and then to the National Insurance Commissioner or a deputy Commissioner (both barristers or advocates of not less than ten years' standing) or to a tribunal presided over by the Commissioner or deputy Commissioner. The Act does not make such procedure mandatory for the determination of any other questions under it. Regulations may provide for their determination by the Minister, or by a person or tribunal, and, subject to the provisions of the regulations, the decision of any such question is to be final. The regulations may, however, provide for appeals to the High Court on any issue of law arising in connection with the determination of a question by the Minister. It is difficult to see why the Act could not itself have laid down the fundamentals on these points. The procedure for the determination of disputes is of the very essence of the statutory scheme and the legislature could itself have prescribed at least its essentials, if only to the extent done with respect to the procedural provisions on the disposal of questions regarding the right to benefit. Instead, such vital points as whether the decision is to be by the Minister or by a known, specialized tribunal, and the availability of appeals to the courts, at least on grounds of law, are left entirely to Executive discretion.

That such matters can be adequately dealt with in statutory form, and with a large measure of judicial control provided for, is shown by the analogous provisions of the prior British insurance acts, which have already been briefly touched upon. Thus, under Section 161 of the National Health Insurance Act, 1936, which may be taken as the type, the determination of several im-

portant questions of "insurability" was entrusted to the Minister of Health; e.g., whether any employment was employment within the meaning of the Act, or whether a person was an employer or employee. This power is clearly judicial in nature, and is of a type that might easily be conferred upon the ordinary courts, but for the great mass of cases which arise. Recognizing this, it was the practice of the Ministry, when a hearing was considered necessary in such cases, to hold such a hearing before a member of the legal staff of the department, who was either a barrister or solicitor, and the ministerial decision was based upon a report of the hearing officer.<sup>29</sup> The decision of the Minister was subject to appeal on any question of law to a judge of the High Court selected by the Lord Chancellor, whose decision was to be final. In addition, the Minister could submit questions concerning *classes* of employment to the High Court in the first instance.

The cases which arose under the British insurance acts are a striking example of how control by the courts can be maintained without rendering impossible the carrying out of a huge State social-service program. They furnish a pragmatic answer to those who assert that the right to resort to the courts would make the effective execution of any such legislative scheme impossible. The tremendous volume of cases and the consequent delay in the achievement of the statutory policy are the chief argument of those who assert that access to the courts must be barred in such cases. Yet, aside from the comparatively short period after any such enactment, when doubtful points are submitted to the judiciary for resolution, relatively few cases arise. Once a decision has been rendered clarifying some portion of the statute, it does not come up again, solely for the purpose of obstructing Executive efficiency. Once the appellate tribunal has laid it down, for example, that a particular newsboy is or is not an employee within the meaning of the Act, the employers of all other news-

<sup>29</sup> Committee on Ministers' Powers, Memoranda, 42.

boys will acquiesce in the decision, much as they might disapprove of the legislative policy and desire to hinder its execution. This in fact is what happened under the British insurance-act procedure. A large number of cases dealing with doubtful categories was decided soon after the Act came into force, but within a short time comparatively few cases were submitted for judicial decision. Many of the cases which were decided by the courts in the early days of these acts had, indeed, been submitted by the Minister under his power of direct reference, mentioned above, in order to obtain judicial assistance in the solution of the novel questions which arose from the attempt to translate the Parliamentary program from the pages of the statute book into a working reality. Many of these cases involved highly technical and complex questions and their disposition indicates that the courts are not as unsuited to deal with such matters, at least in so far as points of law are involved, as some have asserted.<sup>30</sup>

The type of specialized ministerial tribunal discussed above, as has been indicated, deals with a comparatively small proportion of the disputes which have been committed to the Executive for determination.<sup>31</sup> In the majority of cases, judicial power, either original or appellate, has been conferred directly upon the relevant minister. A central government department, such as the Ministry of Health, thus exercises a great number of most diverse judicial functions, which range in kind from some that are strictly analogous to those traditionally associated with the ordinary courts to others where the purely administrative element predominates.<sup>32</sup> Recognizing this, the Committee on Ministers' Powers sought to distinguish between what it called "judicial" and "quasi-judicial" decisions.<sup>33</sup> A true judicial decision was

<sup>30</sup> Other types of specialized tribunals which are of interest are those set up under the Pensions Appeal Tribunals Act, 1943, 6 & 7 Geo. VI, c. 39, and the National Assistance Act, 1948, 11 & 12 Geo. VI, c. 29.

<sup>31</sup> One should, however, note an increasing tendency in the direction of such tribunals. See Robson, *op. cit. supra* note 10, at 474.

<sup>32</sup> See Ministry of Health Memorandum, Minutes of Evidence, 126-27.

<sup>33</sup> Report, 73.

said to presuppose an existing dispute between two or more parties and involve four requisites: (1) the presentation of their case by the parties to the dispute; (2) the ascertainment of questions of fact by means of evidence adduced by the parties, often with the assistance of argument; (3) the submission of legal argument on questions of law; and (4) a decision that disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law—*i.e.*, the application to the case at hand of appropriate authoritative precepts, or, where none are directly applicable, the reasoning from them by analogy in accordance with the trained technique of the judicial process. A quasi-judicial decision was asserted to involve the first and second of these traits, but not necessarily to involve the third, and never the fourth.

The Committee then went on to use this twofold classification as a *prima-facie* guide to legislative action. "If the measure is one in which justiciable issues will be raised in the course of carrying the Act into effect, and truly judicial determination will be needed in order to reach decisions, then *prima facie* that part of the task should be separated from the rest, and reserved for decision by a Court of Law . . . . It is only on special grounds that judicial functions should be assigned by Parliament to Ministers or Ministerial tribunals . . . . But quasi-judicial decisions stand on a different footing. The presumption as to the correct legislative course is the other way; for a decision which ultimately turns on administrative policy should normally be taken by the executive Minister."<sup>34</sup>

As opposed to both judicial and quasi-judicial determinations the Committee distinguished "decisions which are purely administrative."<sup>35</sup> In the case of such decisions, there is no legal obligation upon the person charged with the duty of reaching the

<sup>34</sup> *Id.* at 93.

<sup>35</sup> *Id.* at 81. *Cf.* Labour Relations Board of Saskatchewan v. John East Iron Works, [1949] A. C. 134, 148.



decision to consider and weigh submissions and arguments, to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means that he takes to inform himself before acting, are left entirely to his discretion. But, even here, the line is not clearly drawn, for many administrative decisions may involve, at some stage, certain of the attributes of a judicial decision.

The Donoughmore Committee's attempt to subdivide the Executive power to decide disputes into "judicial" and "quasi-judicial" power may have some validity as a guide to legislative action. But the difficulty of distinguishing between the two in concrete cases—best illustrated by the confused attempts of some of the witnesses before the Committee to do so<sup>36</sup>—tends to vitiate its usefulness even here, in all but the obvious cases. Aside from this possible use, the attempted classification is of little value.<sup>37</sup> The same principles apply in either case with regard to the procedural essentials which must be observed and as far as control by the courts is concerned. Whether the function be judicial or quasi-judicial, the "fundamentals of fair play" must be observed and the same degree of judicial supervision must be maintained. This is clearly shown by *Cooper v. Wilson*,<sup>38</sup> where the dismissal of a constable by a municipal Watch Committee was held to violate the principles of "natural justice" owing to the presence during the Committee's deliberations of the Chief Constable, from whose sentence of dismissal the appeal to the Watch Committee was taken. After reciting the attempted distinction drawn by the Donoughmore Committee (for which he was, himself, largely responsible), and then deciding that "on such issues as were tried before the Watch Committee on Aug. 29, the quasi-judicial approaches in point of degree very near to the judicial," Scott, L.J., goes on to admit that "whether the Watch Commit-

<sup>36</sup> See, e.g., discussion between Sir John Anderson and W. A. Robson, Minutes of Evidence, 81 *et seq.*

<sup>37</sup> See Robson, *op. cit. supra* note 10, at 350 *et seq.*

<sup>38</sup> [1937] 2 K. B. 309.

tee's function was judicial or only quasi-judicial makes no difference to the present case, because there are only three criticisms made before us on behalf of the appellant of its conduct of the hearing of August 29, and those are as much applicable to one function as to the other."<sup>39</sup>

Similar considerations apply, though perhaps with less force, to the Donoughmore Committee's classification of "administrative" as opposed to "judicial" decisions, for here, too, there is great difficulty in applying the distinction in practice to all but the most obvious cases. This can be shown by reference to one of the Committee's examples of pure administrative decisions, obviously one thought to be a clear-cut case; namely, the decision of the Home Secretary to grant naturalization to a particular alien.<sup>40</sup> It is true that Parliament has given the Home Secretary an absolute discretion in the matter,<sup>41</sup> but that should not be the conclusive test in determining the nature of the function. Naturalization of aliens is, in this country, committed to the discretion of the constitutional courts, and we have the authority of Mr. Justice Brandeis for contending that it is a truly judicial function.<sup>42</sup> This is not to assert that Justice Brandeis is right and the Donoughmore Committee wrong (one can, indeed, see the guiding hand of expediency throughout the *Tutun* decision), but to show the difficulty of classification here even in a supposedly obvious case.

The attempt to use the suggested classification as more than a legislative guide—to employ it as a basis for procedural standards and for determining the availability of judicial review—can even lead to harmful results in all but the clear-cut cases. Thus, in *Ex parte Venicoff*,<sup>43</sup> a case dealing with the deportation

<sup>39</sup> [1937] 2 K. B. at 341.

<sup>40</sup> Report, 81.

<sup>41</sup> British Nationality and Status of Aliens Act, 1919, 4 & 5 Geo. V, c. 17,

§ 2 (3).

<sup>42</sup> *Tutun v. United States*, 270 U. S. 568 (1926).

<sup>43</sup> [1920] 3 K. B. 72.

power of the Home Secretary under the Aliens Order, 1919, it was contended that a deportation order could not be made without affording the alien an opportunity to be heard. The relevant statute, the Aliens Restriction Act, 1914,<sup>44</sup> merely authorized His Majesty in Council to impose restrictions on aliens, and to make provision by order for their deportation. The Aliens Order promulgated under this Act empowered the Home Secretary to make a particular deportation order "if he deems it to be conducive to the public good." It was asserted for the alien in the instant case that, even admitting that an inquiry was not required under this language, the right of the alien to be heard was an essential element of "natural justice." The court, by implication, conceded that the maxim "*Audi alteram partem*" was a fundamental rule of "natural justice," but maintained that these procedural essentials were required only of a judicial tribunal. The Home Secretary, here, was exercising not judicial but administrative functions, for the matter in question was left entirely to his discretion. "I therefore come to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgment whether upon the facts before him it is desirable that he should make a deportation order." Since the decision involved was purely an administrative one, the principles of "natural justice" did not apply. "As soon as we come to the conclusion that this is an executive act left to the Home Secretary and is not the act of a judicial tribunal, the argument [*i.e.*, of the alien] fails."<sup>45</sup> The grounds upon which the Home Secretary was to act, and the means that he was to take to inform himself before acting, were vested in his absolute discretion.

It will at once be noted that this case is very similar to the example of a pure administrative decision given by the Donoughmore Committee and referred to above; namely, the decision of

<sup>44</sup> 4 & 5 Geo. V, c. 12, § 1.

<sup>45</sup> [1920] 3 K. B. at 80. *Cf. Hutton v. Attorney-General*, [1927] 1 Ch. 427.

the Home Secretary to grant naturalization to a particular alien. Both types of cases are executive in the sense that the ultimate decision is placed in the complete discretion of the Home Secretary. But the judicial element surely looms large here, if one has regard to the nature of the function of the deciding officer. The Parliamentary power to commit such matters to unfettered Executive discretion must, of course, be conceded to a degree impossible in this country. This is not to say, however, that the minimal procedural requirements—the fundamentals of justice which have grown up in the common-law world—can be dispensed with by the Executive where Parliament has left the matter open. Whether the particular function falls on one side or the other of the judicial-administrative line should not, of itself, determine whether the rules of “natural justice” obtain.

Here, too, as in the naturalization cases, the American courts have reached a different result. Due process here requires a fair hearing in deportation cases,<sup>46</sup> although the relevant proceeding is conceded to be, “throughout, executive in its nature.”<sup>47</sup> It is the type of decision, with its consequences for the individual involved—which “obviously deprives him of liberty” and “may result also in loss of both property and life; or of all that makes life worth living”<sup>48</sup>—and not what is, after all, only a descriptive tag that should be the governing factor.

Nor should the availability of judicial review be dependent upon which side of the line the particular function is seen to fall. Any Executive decision that determines private rights and obligations should be rendered according to the rules of “natural justice” and be subject to judicial review, regardless of whether it be considered as “judicial,” “quasi-judicial,” or “administrative.” “Wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation

<sup>46</sup> *Chin Yow v. United States*, 208 U. S. 8 (1908).

<sup>47</sup> *Ng Fung Ho v. White*, 259 U. S. 276, 284 (1922).

<sup>48</sup> *Ibid.*, per Brandeis, J.

upon individuals," said Brett, L.J., in an important case on the availability of nonstatutory review, "the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament . . . . Whether the decision of the Local Government Board is to be considered as judicial, I do not know that it is necessary to determine in the present case."<sup>40</sup>

The delegation to Executive agencies of the authority to determine disputes may often be accompanied by many of the coercive powers normally associated with the ordinary courts, such as the power to impose penalties. The Executive authority here may range from the withholding of fees earned to the exaction of a monetary fine, or even to the loss of professional standing and the probable deprivation of livelihood. The Executive imposition of penalties in Britain can best be illustrated by some of the disciplinary powers given to the Minister of Health over physicians by the various insurance acts. Under Section 10 (2) of the Act of 1924,<sup>50</sup> insured persons were entitled to be supplied with proper and sufficient drugs and medicines. Provision was made in the regulations issued by the Ministry of Health for withholding remuneration from a doctor if it was established that, by reason of the character or quantity of the drugs ordered by him, the charge imposed on the funds available for the provision of medical benefit was in excess of what was reasonably necessary for the adequate treatment of his patients—i.e., the so-called offense of "excessive prescribing."<sup>51</sup> The validity of a substantially similar regulation, under the earlier Act of 1912, was upheld in *O'Neill v. Middlesex Insurance Committee*,<sup>52</sup> on the ground that some such check on extravagance was shown to be necessary by experience. The procedure involved had many of

<sup>40</sup> *Reg. v. Local Government Board* (1882), 10 Q. B. D. 309, 321.

<sup>50</sup> 14 & 15 Geo. V, c. 38.

<sup>51</sup> See Committee on Ministers' Powers, Memoranda, 46.

<sup>52</sup> [1916] 1 K. B. 331.

the features of a judicial trial: there was a hearing before a medical advisory committee and an appeal to a tribunal of three doctors, who were not officers of the Ministry, and the Minister normally acted on their advice, though he was not obligated to do so.

The Minister's power to remove doctors from the panel of medical practitioners who could treat insured persons, which might mean the loss of livelihood for the particular physician, was very broad. The relevant section provided merely that: "If the Minister, after such inquiry as may be prescribed, is satisfied that the continued inclusion in the list of any medical practitioner would be prejudicial to the efficiency of the medical service of the insured, the Minister may remove his name from the list."<sup>53</sup> Here, too, the procedure prescribed by the regulations had many judicial elements. The inquiry was before a tribunal consisting of a practicing barrister or solicitor and two doctors. There was a stated preliminary procedure for defining the issue by pleadings and the right of representation was preserved. The report of the Inquiry Committee was then referred to an Advisory Committee and the decision of the Minister was given after taking the report and the recommendations of the Advisory Committee into consideration.<sup>54</sup>

The penal powers granted under the National Health Service Act, 1946,<sup>55</sup> are, if anything, even broader. The Act sets up a comprehensive system of socialized health insurance, and the disqualification of practitioners from participating in the system deprives them of all but a very small area of possible employment. Because of this tremendous power, the authority to disqualify a practitioner, where his continued inclusion in the list would be prejudicial to the efficiency of the health services, is vested in a specific tribunal set up under the Act, the chairman of which is

<sup>53</sup> National Health Insurance Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 32, § 36.

<sup>54</sup> Committee on Ministers' Powers, Memoranda, 44.

<sup>55</sup> 9 & 10 Geo. VI, c. 81, § 42.

an experienced barrister or solicitor appointed by the Lord Chancellor. The right of counsel is preserved, and, though there is a right of appeal to the Minister of Health, the initial power here is vested in the independent tribunal, the authority of the Minister being confined to confirming or revoking its decision. This procedure represents a definite improvement over the prior acts. Where penal powers of such a wide nature are granted, they should be committed to a known, specialized tribunal. This is especially true where the power delegated to the Executive is as broad as that under the Health Service Act.

A related point, which, logically speaking, falls under the heading of delegated legislation, concerns the imposition of penalties by administrative regulation. Such imposition by subordinate legislation is comparatively rare, the usual thing being for Parliament itself to prescribe that the violation of the regulations shall be subject to a stated penalty as a breach of the act. This is said to date back to Stuart times and the objection to penalties imposed by royal proclamation.<sup>56</sup> The dangers inherent in allowing the regulation-making power of the Executive to extend to the imposition of penalties seems obvious, and Sir Courtenay Ilbert, third "in the line of Parliamentary Counsel in Britain,"<sup>57</sup> and author of an important early book dealing with delegation, consequently advised that, in general, delegated legislation should not authorize their imposition.<sup>58</sup> There are, however, some examples of such delegations. Thus, the London Traffic Act, 1924,<sup>59</sup> stipulates that the regulations made under it may provide for imposing fines recoverable summarily for breaches thereof up to certain stated maximum amounts. The various regulations that were promulgated under the Act provided in great detail the penalties for their contravention.<sup>60</sup> In the

<sup>56</sup> Mr. (now Sir) Cecil Carr, Minutes of Evidence, 214.

<sup>57</sup> Carr, *Concerning English Administrative Law* (1941) 33.

<sup>58</sup> *Legislative Methods and Forms* (1901) 310.

<sup>59</sup> 14 & 15 Geo. V, c. 34, § 10 (3).

<sup>60</sup> See, e.g., *Statutory Rules and Orders* (1925) Nos. 905, 907.

acute characterization of a member of the Donoughmore Committee: "We have an instance here of the imposing of a penalty, not by Royal Proclamation but by the prerogative of J. S. Pool Godsell, Assistant Secretary."<sup>61</sup>

But to return to our general theme of British administrative justice. Up till now, we have dealt with the determination of disputes by the ordinary Executive departments—either by the relevant minister or by specific ministerial tribunals. To treat of these alone would not, however, give us a complete account of the justice dispensed in Britain by agencies other than the ordinary courts. It is necessary, therefore, to round out the picture by some reference to other tribunals. In doing so, we shall, in general, follow the analysis of the Donoughmore Committee Report. Our treatment will by no means be a complete one, for its purpose is only to give some indication—in bare outline, as it were—of the work of these agencies, and the reader who desires a more adequate comparative discussion is referred to the analysis of them in Professor Cushman's treatise on *The Independent Regulatory Commissions*.

The Donoughmore Committee characterized many of these nonministerial bodies, which exercise powers of a judicial nature, as "specialised Courts of Law."<sup>62</sup> It is well, however, to bear in mind that they are not "courts" in the sense in which the ordinary law courts are. They vary, indeed, in their composition, procedure, and functions from some that are closely analogous to the traditional judicial tribunals to others that bear a greater resemblance to the usual administrative tribunals.

The first of these agencies worthy of note are the so-called Railway Courts. "The Railway and Canal Commission is an interesting example of a body whose structure and functions lie midway between those of a court of law on the one hand and

<sup>61</sup> Sir Roger Gregory, *Minutes of Evidence*, 214.

<sup>62</sup> Report, 83.



an administrative tribunal on the other.”<sup>63</sup> It was created by statute in 1888<sup>64</sup>—almost at the same time when we in America saw fit to undertake the regulation of railroads by an administrative agency, the Interstate Commerce Commission—and succeeded to the work of an earlier commission, which had taken over the jurisdiction over railways previously vested in the Court of Common Pleas.<sup>65</sup> Not being hampered by constitutional restrictions on reposing “judicial power” in other than “constitutional courts,” Parliament could style the new tribunal with any label it saw fit, and it was accordingly designated as a Court of Record.<sup>66</sup> The Commission consists of a president, who is a High Court judge assigned by the Lord Chancellor, and two commissioners (one of whom must have had experience in railway business) appointed by the Home Secretary. Prior to the Transport Act, 1947, it dealt with all questions of facilities and preference, could compel two or more companies to make mutual arrangements for through traffic over their railways, and might determine disputes of many kinds between railway companies. It was, however, no longer *the* important agency in the field, as its powers over rates and charges had been transferred to another body, the Railway Rates Tribunal.<sup>67</sup>

The Railway and Canal Commission, although styled a court, has many of the features of an administrative tribunal. Though its president is a High Court judge, its other two members need have no judicial background; their qualifications, indeed, are “administrative or commercial rather than legal or judicial in the ordinary sense.”<sup>68</sup> Many of the matters with which it has dealt,

<sup>63</sup> Robson, *op. cit. supra* note 10, at 87.

<sup>64</sup> Railway and Canal Traffic Act, 1888, 51 & 52 Vict., c. 25.

<sup>65</sup> Railway and Canal Traffic Act, 1873, 36 & 37 Vict., c. 48.

<sup>66</sup> See *National Telephone Co., Ltd., v. Postmaster-General*, [1913] A. C. 546, discussing the position of the Commission as a Court of Record.

<sup>67</sup> On what he calls the “miscellaneous dumped” powers of the Commission—*i.e.*, those wholly unconnected with transportation—see Cushman, *The Independent Regulatory Commissions* (1941) 514.

<sup>68</sup> Robson, *op. cit. supra* note 10, at 92.

e.g., questions of mutual arrangements between railway companies, depend more upon policy than upon law. Its decisions, while subject to appeal to the Court of Appeal, upon questions of law, are final upon questions of fact, which, as we shall see, is a leading characteristic of an administrative decision on both sides of the Atlantic. Against these administrative characteristics must be placed others which are essentially those of an ordinary court. Thus, the procedure of the Commission "follows roughly the rules of common law,"<sup>69</sup> and, although not quite as formal as that of a law court, it is nearly so. In addition, the sanctions which the Commission may apply are basically those traditionally associated with judicial tribunals: they may award damages, issue injunctions and writs of attachment, and have great coercive powers to compel obedience.<sup>70</sup>

The Railway Rates Tribunal, which since 1921 has been in charge of the establishment and supervision of all railway rates,<sup>71</sup> bears a still closer resemblance to the usual administrative tribunal, although it, too, is declared to be a Court of Record by the enabling legislation. It consists of three members, who are appointed for a term of years, one of whom must be experienced in commercial affairs, one in railway business, and the third, who is the president, must be an experienced lawyer. The type of question determined by the Tribunal, largely dealing with the reasonableness of rates, depends almost completely upon policy, and is of the kind which in this country would be committed to an independent regulatory commission. "The tribunal has avoided over-judicialization of its procedure, which has been kept fairly informal and flexible";<sup>72</sup> its procedure has, in fact, been no more formal than that of an American administrative commission. Its decisions, like those of the Railway and Canal

<sup>69</sup> Cushman, *op. cit. supra* note 67, at 515.

<sup>70</sup> Robson, *op. cit. supra* note 10, at 92.

<sup>71</sup> Railways Act, 1921, 11 & 12 Geo. V, c. 55, § 20.

<sup>72</sup> Cushman, *op. cit. supra* note 67, at 522.

Commission, are also final on questions of fact, though subject to appeal to the Court of Appeal on questions of law.

The Transport Act, 1947,<sup>73</sup> which provides for the nationalization of the transport industry in Britain, extends the jurisdiction of the Railway Rates Tribunal to the entire transport industry and it is now known as the Transport Tribunal. Its composition is somewhat broadened, so that for its member experienced in railway business one "of experience in transport business" may be appointed. Under the Act, the Transport Tribunal has become *the* body exercising judicial powers with regard to the newly nationalized industry. As such, the jurisdiction of the Railway and Canal Commission with respect to railway and canal transport is transferred to the Transport Tribunal, which is also given the authority to handle appeals from the various licensing authorities in road transport of goods cases under Section 15 of the Road and Rail Traffic Act, 1933.<sup>74</sup> Among the most significant powers exercised by the Tribunal are those dealing with the charges to be made by the Transport Commission, the governmental operator of the nationalized industry. The important work of the Tribunal is thus basically similar to what it was prior to the Transport Act; namely, determining the reasonableness of rates. One should note here that the determination of this question is left to an independent "quasi-court" rather than to the governmental operator of the industry, a safeguard that would seem to be of even greater importance in the case of the nationalized industry than in that of the industry operated by the former private owners.

The various tribunals that determine disputes arising under the British income-tax acts are also characterized as specialized Courts of Law by the Donoughmore Committee.<sup>75</sup> The Special Commissioners of Income Tax are the important body here.

<sup>73</sup> 10 & 11 Geo. VI, c. 49.

<sup>74</sup> 23 & 24 Geo. V, c. 53.

<sup>75</sup> Report, 86.

They are appointed by the Treasury and have appellate jurisdiction in matters relating to income tax and surtax.<sup>76</sup> Their decisions are final on questions of fact, but they may be required to state a case for the opinion of the High Court on a point of law arising out of an appeal heard by them. Although these Commissioners "are not only appointed by the Treasury, but may, when not performing judicial duties, actually act as administrative officials,"<sup>77</sup> they give general satisfaction by their impartiality. The similarity of their position to that of the United States Tax Court is at once apparent. This is especially true as far as the review of their decisions is concerned. Something very like the rule in *Dobson v. Commissioner*<sup>78</sup> has, as we shall see, for some time been the guiding principle in the British practice in this field.<sup>79</sup>

One of the most significant types of bodies in Britain exercising powers that are judicial in nature are what Professor Cushman has aptly characterized as "guild agencies";<sup>80</sup> i.e., self-regulation and self-discipline administered by representatives of the private interests affected. These are especially interesting to the American student because of the many efforts in this country to introduce similar schemes of industrial self-government, most of which have been struck down by the courts. The most striking attempt along this line was, of course, the National Industrial Recovery Act, and, although the unconstitutionality of that statute was not based upon this point, it undoubtedly played some part in influencing the Court, as is shown by the subsequent decision in the *Carter* case.<sup>81</sup>

Most of these British "guild agencies" are set up under the

<sup>76</sup> Income Tax Act, 1918, 8 & 9 Geo. V, c. 40, § 67.

<sup>77</sup> Report of the Committee on Ministers' Powers, 87.

<sup>78</sup> 320 U. S. 489 (1944).

<sup>79</sup> *Infra* p. 286.

<sup>80</sup> *Op. cit. supra* note 67, at 550.

<sup>81</sup> *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

Agricultural Marketing Acts, 1931-1933.<sup>82</sup> Under these Acts, marketing schemes have been established for various agricultural products, such as milk, pigs, bacon, potatoes, and hops. A scheme is prepared by representatives of the producers in the industry and may embody such powers and provisions with regard to the marketing of the product as the Acts allow, including the power exclusively to purchase and distribute the product and to fix the prices, terms, and persons to or through whom the product may be sold. The repository of the powers embodied in the scheme is the Marketing Board which is set up for each industry adopting a scheme. After being prepared, a scheme is submitted to the appropriate minister, and must obtain both his approval and that of Parliament, through an affirmative resolution of each House. The provisional scheme must then be submitted to the producers in the industry for their approval or rejection. A two-thirds majority in favor of the scheme is required before it can go into operation. But, once this majority is obtained, "the various provisions of the scheme have the force of law, and are binding on all producers in the industry concerned whether they voted in favour of or against the proposal."<sup>83</sup>

It is true in one sense, as Slessor, L.J., asserted in an important case, that these schemes are of a "voluntary nature,"<sup>84</sup> for they do not come into force until approved by a majority of the producers. But, once approved, they become law for the industry and are "voluntary" only in name, as far as the dissenting producers are concerned. The warning of Mr. Justice Sutherland in *Carter v. Carter Coal Co.* against the grant of such power to the majority in an industry seems just as applicable here as it was in that case. "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not

<sup>82</sup> 21 & 22 Geo. V, c. 42, and 23 & 24 Geo. V, c. 31.

<sup>83</sup> Report of the Departmental Committee on the Imposition of Penalties by Marketing Boards (Cmd. 5980, 1939) 9.

<sup>84</sup> Rowell v. Pratt, [1936] 2 K. B. 226, 236, *rev'd* [1938] A. C. 101.

even delegation to an official or to an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”<sup>85</sup>

The Marketing Boards established under the various schemes possess very wide powers of regulating the industry. It is not, however, with these that we are at the moment concerned, but with the powers of a judicial nature which these bodies enjoy. To ensure the proper functioning of such schemes and to protect producers who abide by them from loss due to their violation by some producers, the agricultural marketing acts authorize the imposition of penalties on producers who contravene the provisions of the schemes. In line with the principle of self-regulation which animated the whole scheme procedure, the authority to impose such penalties is given to the various Marketing Boards, which are elected to exercise control on behalf of the industry, rather than to the ordinary courts, and their power, here, is not subject to any appeal.

The power of these Boards to impose penalties upon dissentient producers has been the subject of much controversy, culminating in the appointment of a committee in 1938 to investigate the matter. The committee's recommendations will be considered at a later point.<sup>86</sup> It is sufficient here to note that much of the criticisms were directed against the merger of the functions of prosecution and adjudication in the Marketing Boards: the same body framed the regulations, initiated charges before itself for their violation, and then imposed penalties if it found the charges to be valid. These objections are not unlike those which have been raised against the combination of functions in American administrative agencies, which has been the focal point for much of the controversy upon administrative law in this country.

<sup>85</sup> 298 U. S. at 311. Cf., on delegation to private bodies, *Ellis v. Dubowski*, [1921] 3 K. B. 621.

<sup>86</sup> *Infra* p. 257.

"Domestic executive" tribunals,<sup>87</sup> such as the Marketing Boards and other similar bodies, as well as the ordinary Executive repositories of judicial power (both the Minister, as such, and the specific ministerial tribunal) discussed above, are manifestations of the increasing tendency toward nonjudicial justice which has accompanied the growth in the social-service functions of the State. In this respect, the trend toward Executive justice parallels that in the field of delegated legislation, which, as we have seen, has been caused by basically the same economic and political factors. We can, likewise, expect that the acceleration of the development toward the Public-Service State under the Labor Government will result in even greater reliance in Britain upon Executive justice. The undertaking by the State of any new program of social service is almost inevitably attended by delegations of judicial power to the Executive. The great mass of claims which arise and the disputes which must be settled, more on the basis of policy than law, cannot expeditiously be committed to the ordinary courts. Nor can government regulation be effectively carried on by reliance upon the traditional judicial machinery, which is brought into play only upon the initiative of the particular individual involved. Although some Executive tribunals perform functions that are analogous, or almost analogous, to those of the ordinary courts, most of them decide more upon the basis of policy and notions of Executive equity than of applicable legal precepts. Benefits are granted or rights withheld as the magistrate thinks it just or reasonable to do so.

The type of tribunal we can come to expect is exemplified by those established under the Furnished Houses (Rent Control) Act, 1946.<sup>88</sup> That Act, which applies to all "houses or parts thereof let at a rent which includes payment for the use of furniture or for services," creates a new legally enforceable con-

<sup>87</sup> The characterization of Lord Maughan in *Rowell v. Pratt*, [1938] A. C. 101, 113.

<sup>88</sup> 9 & 10 Geo. VI, c. 34.

cept which is to be a restriction upon the traditional right of freedom of contract, namely, that of a "fair rent." Any party to a contract for furnished letting, whether entered into before or after the passing of the Act, may refer such contract to the relevant Rent Tribunal for the district. The Tribunal is to consider such reference, and after making such inquiry as they think fit, and giving to each party an opportunity of being heard, "shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable." The Tribunal may also, in its discretion, increase the rent to cover increases in the cost of services since 1939. Rents in excess of those approved by the Tribunal are declared to be illegal and persons requiring or receiving such additional rents are guilty of a criminal offense, punishable by up to £100 fine or six months' imprisonment, or both.

Here, indeed, is an extraordinary power to confer upon a non-judicial tribunal. It is true that rent control, as far as unfurnished houses are concerned, has been a feature of the landlord-tenant relationship in Britain since the First World War.<sup>80</sup> But the administration of such controls has been vested not in an administrative tribunal but in the ordinary courts, with the normal right of appeal to the Court of Appeal preserved.<sup>80</sup> Nor is the discretion of the courts in these cases an unfettered one. In general, the validity of rents is to be judged according to a "standard rent," which is the rent at which the premises were let on a date specified in the relevant acts, although certain substantial increases are permitted. This is quite similar in nature to the standard for controlling administrative discretion in the American Emergency Price Control Act of 1942,<sup>81</sup> and is some-

<sup>80</sup> The present Act is the Rent and Mortgage Interest Restrictions Act, 1939, 2 & 3 Geo. VI, c. 71.

<sup>80</sup> See, e.g., *Insall v. Nottingham Corp.*, [1949] 1 K. B. 261. Under the Landlord and Tenant (Rent Control) Act, 1949, 12 & 13 Geo. VI, c. —, all post-1939 initial lettings are now subject to the jurisdiction of the Rent Tribunals.

<sup>81</sup> 56 Stat. 23 (1942). See *Yakus v. United States*, 321 U. S. 414 (1944).



thing very different from allowing the control tribunal to fix the rent at the sum which they think reasonable, even apart from the safeguards involved in committing such jurisdiction to the ordinary law courts instead of to administrative tribunals.

The Rent Tribunals authorized under the 1946 Rent Control Act are even less "judicialized" in character than the usual type of ministerial tribunal discussed above. The Minister of Health can direct that the Act shall be in force in any local district and for every such district a tribunal is to be constituted by him. Neither the Act nor the regulations under it<sup>92</sup> prescribe the constitution of these tribunals, other than to state that they are to consist of a chairman and two other members, appointed by the Minister and holding office during his pleasure. Under this, the Minister can appoint any one whom he chooses, without regard to their personal or professional qualifications. But, in fact, it is the usual practice for at least the chairman to be a person of legal experience. The procedure before a Rent Tribunal is not very formal. Reference of a case is made by a simple written notice, and although the right to appear by counsel or solicitor is expressly preserved it is not generally exercised, so that the hearing may take on a quite informal character.

The vast majority of the decisions rendered by these tribunals have been in the direction of drastically reducing rents, and their work has consequently been very popular, for the landlords affected constitute but a small minority. In both their procedure and the general approbation that has greeted their work, they thus approach the position of "people's courts." Not being bound by rigid rules, they can dispense justice that accords with the ethical sentiment of the community. This, indeed, is one of the prime advantages of such reversions to justice without law. In times of rapid transition, such as the present, law, which is after all but the crystallization of past experience, may often lag behind what society has come to expect due to changing ideas

<sup>92</sup> Statutory Rules and Orders (1946) No. 781.

concerning the end to be served by the State. Hence the frequent resort during such periods to justice unfettered by strict law, under which the magistrate may decide in keeping with the moral sense of the community, unhampered by strict rules.

There is, however, a great danger in extending justice of this sort, uncontrolled by law. Formal rule is, in Ihering's phrase, the sworn enemy of caprice, the twin sister of liberty. Rules are "needed to guide the weak judge and to save us from his lack of will and lack of judgment."<sup>93</sup> The great virtue of the judicial process is that there are checks which obtain upon it that reduce to a minimum the risk of arbitrariness because of the weakness of the individual judge. The trained technique of decision through the application of authoritative precepts practically eliminates the individual factor, at least in so far as it is possible to do so where human judgment is involved.

The growth of justice of the rent-tribunal type, which is to be expected in Britain, must, therefore, not be an uncontrolled one, if the traditional framework of the common-law polity is to be maintained. The decisions of the Rent Tribunals are, to all intents and purposes, final, for as stated by Lord Goddard, C.J., "Parliament has chosen to make them the absolute masters of the situation and to leave the decision of these cases to them without appeal."<sup>94</sup> However justified may be the initial conferring of judicial power of this nature upon agencies other than the ordinary courts, the grant to them of immunity from any judicial control is surely inconsistent with the rule of law.

<sup>93</sup> See Pound, "Justice According to Law" 13 Col. L. Rev. 702 (1913).

<sup>94</sup> *Rex v. Furnished Houses Rent Tribunal*, [1947] 1 All E. R. 448, 450. The courts can, however, intervene where a Rent Tribunal acts beyond its jurisdiction. *Rex v. Paddington and St. Marylebone Rent Tribunal*, [1948] 2 K. B. 413; *Rex v. Blackpool Rent Tribunal*, [1948] 2 K. B. 277; *Rex v. Croydon Rent Tribunal*, [1948] 1 K. B. 60; *Rex v. Hampstead and St. Pancras Rent Tribunal*, [1947] K. B. 973.

## CHAPTER IV

### LEGISLATIVE CHECKS

"Any outside observer of the Parliamentary machine could not fail to be struck by the extraordinary difference in the amount of attention which both Houses devote to legislation by bill and legislation by statutory instrument respectively. In the House of Commons, for example, a bill can be discussed at four stages, three of which necessarily take place in the House itself. On the other hand a statutory instrument, if reviewable at all, is in the generality of cases only reviewed on the initiative of an individual Member, and then only at an hour when full consideration is difficult."<sup>1</sup>

This differentiation in treatment as between legislation and delegated legislation is, of course, in many respects inevitable. The very purpose of granting sublegislative authority to the Executive is to relieve Parliament of the burden of dealing with these matters by way of legislation. The increasing pressure on Parliamentary time, caused in great degree by the growing pre-occupation of government with "the management of the life of the people,"<sup>2</sup> has, as we have seen, led to an ever-increasing reliance in Britain upon the devolution of legislative functions upon the Executive. The very purpose of this development would be defeated if the same Parliamentary treatment were to be given to legislation by Statutory Instrument as is given to legislation by bill.

<sup>1</sup> Sir Gilbert Campion, Clerk of the House of Commons, in Select Committee on Procedure, Minutes of Evidence (Commons Papers 189, 1946) 352.

<sup>2</sup> Report of the Committee on Finance and Industry (Cmd. 3897, 1931) 4.

At the same time, however, there is raised the problem of Parliamentary control. The growing role of delegated legislation in the modern State means that a very large part of the business of legislation is coming to be carried on outside of Parliament. Nor, as we have noted, is this true only of comparatively unimportant matters; the delegated legislation may often have a greater impact upon the subject than the enabling act. Though "most bills are more important than most statutory instruments, . . . many of the latter affect the public more widely and more closely than many statutes."<sup>3</sup> Likewise, any attempted division of the field as between legislature and Executive on the basis of the "principle-detail" classification does not give a true picture, even assuming that one can answer the question: What is principle and what is detail?<sup>4</sup> Delegation even on matters of so-called detail "does to some extent entail an abandonment by Parliament of its legislative functions. The details which are left to be determined by the Privy Council or a Minister may closely affect the rights and property of the subject, and even personal liberty."<sup>5</sup>

The ultimate Parliamentary control over the Executive lies, of course, in the position of Parliament as the supreme legislative organ of the land; it alone possesses *the* legislative power. It is Parliament alone that can grant power to the Executive, and it may at any time revoke or modify power so granted. This theoretical position of supremacy may, however, be of small practical value if, in fact, little or no discretion is employed in the delegation of power and little or no control is exerted over the exercise of the power so delegated.

Parliamentary supervision over delegated legislation is asserted principally through stipulations in the delegating enactment that regulations made thereunder shall be laid before Parliament. The

<sup>3</sup> Campion, *op. cit. supra* note 1, at 352.

<sup>4</sup> See Allen, *Law and Orders* (1945) 119.

<sup>5</sup> Report of the Committee on Ministers' Powers, 6.

Committee on Ministers' Powers has listed five different forms in which the requirement of laying is phrased in various statutes:

- (i) Laying—with no further directions;
- (ii) Laying—with provision that, if within a specified period of time a resolution is passed by either House for annulling (in some cases for annulling or modifying) the regulation, the regulation may—or shall—be annulled or modified, as the case may be, by Order in Council;
- (iii) Laying—with provision that the regulation shall not operate, until approved by resolution; or shall not operate beyond a certain specific period, unless approved by resolution within that period. Sometimes it is an affirmative resolution of both Houses, but sometimes only of the House of Commons;
- (iv) Laying in draft for a certain number of days;
- (v) Laying in draft with provision that the regulation is not to operate till the draft has been approved by resolution.<sup>6</sup>

There is no general statute that requires regulations to be laid before Parliament. Consequently, whether or not a particular regulation has to be laid<sup>7</sup> and, if so, which of the above categories it comes within depend upon the relevant enabling act. There seems to be no consistent principle in the various statutes governing the choice of these forms of Parliamentary supervision. Indeed, the Donoughmore Committee went so far as to assert that "it is impossible to discover any rational justification for the existence of so many different forms of laying or on what principle Parliament acts in deciding which should be adopted in any particular enactment."<sup>8</sup>

There seems to be little doubt that the procedure by way of affirmative resolution<sup>9</sup> enables the legislature to exercise a greater

<sup>6</sup> *Id.* at 41.

<sup>7</sup> There are still many cases where the governing statute does not require delegated legislation to be laid at all, though they have tended to become of diminishing importance.

<sup>8</sup> Report, 42.

<sup>9</sup> *I.e.*, iii above.

degree of control over delegated legislation than that of annulment by negative resolution.<sup>10</sup> "It is a far more effectual control than the others, since it ensures that the subordinate enactment shall be considered by Parliament before it is perpetuated, whereas under the procedure of 'negative resolution' there is no guarantee that the Rule or Order will ever receive any real attention at all unless some member specially interests himself in it."<sup>11</sup> Here, too, there is no Parliamentary consistency, but the tendency has been to follow Sir Gilbert Campion's rough rule of thumb: "The more important [statutory instruments] follow the affirmative procedure and the less important ones the negative procedure."<sup>12</sup> This would clearly appear to be the desirable governing principle, if effective Parliamentary supervision is the desideratum to be attained. This is especially true of the *exceptional* types of delegated legislation, which we have considered in our general discussion of delegated legislation.<sup>13</sup> Here, the power granted is, by its very nature, such that one would desire Parliament to assert as much control as possible. Some statutes have, therefore, adopted the affirmative-resolution procedure for certain of the *exceptional* exercises of the rule-making power.<sup>14</sup> Thus, Section 15 (2) of the Mental Treatment Act, 1930,<sup>15</sup> after providing for the laying of rules made under it subject to annulment by negative resolution, goes on to provide that such procedure "shall not apply to any rules which modify or adapt any enactment, whether in this or any other Act, but such rules shall cease to have effect upon the expiration of a period of three months from the date on which they came into operation unless at some time before the expiration of that period they have been approved by a resolution passed by each House of Parliament."

<sup>10</sup> *I.e.*, ii above.

<sup>11</sup> Allen, *op. cit.* *supra* note 4, at 66.

<sup>12</sup> Select Committee on Procedure, Minutes of Evidence, 20.

<sup>13</sup> *Supra* p. 48.

<sup>14</sup> This seems to be invariably true of rules and regulations imposing a charge.

<sup>15</sup> 20 & 21 Geo. V, c. 23.

Though there has been growing up "a considerable body of opinion that the affirmative (or 'positive') resolution method should be used more freely in order to stimulate Parliamentary vigilance,"<sup>16</sup> it is still rarely resorted to by comparison with its opposite number, the negative-resolution procedure. The same reasons which have led men like Dr. Allen to urge its extension have led the government departments to oppose its growth, for "it makes the future of Rules and Orders more precarious than it would be ordinarily."<sup>17</sup> Indeed, the Ministry of Health, in its memorandum to the Donoughmore Committee, contended that, if the affirmative-resolution requirement "should be made a universal or even a general application, the effect must be either to produce a complete block in the business of Parliament or to render departmental administration impossible."<sup>18</sup>

No less varied than the methods of laying are the times prescribed in the various statutes during which the delegated legislation must remain in "quarantine." Here, too, there is no logical principle to explain the differences and they seem to have been adopted largely as a matter of accident. As put by Sir William Graham-Harrison: "It is a mere matter of chance. It depends on the number of days I am thinking of when I am drafting something."<sup>19</sup> The lack of uniformity here is rather amazing to an outsider. "In some cases the number is as great as 100; in others it is as small as 20. Between these extremes lie periods of 40, 36, 30, 28 and 21 days; 28 and 21 days are common."<sup>20</sup> The same difficulty arises with respect to whether the days specified are days on which Parliament is sitting. "In most cases 'days' means 'sitting days,' i.e. days on which Parliament actually sits, but sometimes Parliament has neglected to specify that the days are to be sitting days."<sup>21</sup>

<sup>16</sup> Allen, *op. cit.* *supra* note 4, at 66.

<sup>17</sup> *Ibid.*

<sup>18</sup> Minutes of Evidence, 123.

<sup>19</sup> *Id.* at 42.

<sup>20</sup> Report of the Committee on Ministers' Powers, 42.

<sup>21</sup> *Ibid.*

To the lack of uniformity here is to be added the confusion of nomenclature of the various forms of delegated legislation. The system of Executive sublegislation has, to a large extent, grown up in a haphazard fashion, in response to the pressures of particular economic and social circumstances. "As a natural consequence the choice of terminology has also been accidental; and the nomenclature of delegated legislation is confused."<sup>22</sup> Thus, there is a vast variety of terms used. "The Act of Parliament which delegates the power may in so many words lay down that 'regulations', 'rules', 'orders', 'warrants', 'minutes', 'schemes', 'bye-laws', or other instruments—for delegated legislation appears under all these names—may be 'made' or 'approved' under defined conditions."<sup>23</sup> There is, it is true, a general distinction between rules and regulations, *i.e.*, instruments of general application, and orders, *i.e.*, instruments relating to particular areas or particular localities or classes of persons. But even this distinction is not fully carried out in practice,<sup>24</sup> and the use of the other terms mentioned above is often quite indiscriminate. Although, as Dr. Allen points out, the inconvenience here "is one of form rather than of substance, since there is no distinction in actual legal validity between these variously named sub-laws,"<sup>25</sup> still there is some resulting confusion which might easily be avoided. The Donoughmore Committee accordingly urged that Parliament adopt some consistency in terminology, along the lines of the generally accepted "regulation-order" distinction,<sup>26</sup> but little seems to have been done since then.

The irrational lack of uniformity in the laying procedure, referred to above, led the Donoughmore Committee to recom-

<sup>22</sup> *Id.* at 16.

<sup>23</sup> *Ibid.* The confusion here is not confined to the other side of the Atlantic. See, *e.g.*, Comer, Legislative Functions of National Administrative Authorities (1927) 27.

<sup>24</sup> Examples of this are given in Report of the Committee on Ministers' Powers, 18.

<sup>25</sup> *Op. cit. supra* note 4, at 46.

<sup>26</sup> Report, 64.



mend a standardization of such procedure. "Except when Parliament expressly requires an affirmative resolution, there should be uniform procedure in regard to all regulations required to be laid before Parliament, namely that they should be open to annulment—not modification—by resolution of either House within 28 days on which the House has sat, such annulment to be without prejudice to the validity of any action already taken under the regulation which is annulled."<sup>27</sup>

The Statutory Instruments Act, 1946,<sup>28</sup> gives at least partial effect to this suggestion. Under Section 5 of that Act, where by any act it is provided that any Statutory Instrument shall be subject to annulment in pursuance of resolution of either House, the Instrument shall be laid before Parliament. If either House, within the period of forty days beginning with the day on which a copy is laid before it, resolves that an address be presented to His Majesty praying that the Instrument be annulled, no further proceedings shall be taken thereunder after the date of the resolution. And His Majesty may by Order in Council revoke the Instrument so, however, that any such resolution and revocation shall be without prejudice to the validity of anything previously done under the Instrument or to the making of a new Statutory Instrument.

This provision does give partial effect to the recommendations of the Donoughmore Committee on standardization of the laying procedure. Standardization is introduced with regard to the procedure for Statutory Instruments that are subject to annulment by negative resolution. The difference here in the prescribed "quarantine" period—forty instead of twenty-eight days—is, if anything, in the direction of more effective Parliamentary supervision. The Act does not, however, go as far as the Donoughmore

<sup>27</sup> *Id.* at 67.

<sup>28</sup> 9 & 10 Geo. VI, c. 36. The term "Statutory Instrument" is a new generic name given by this Act to what has heretofore been known as Statutory Rules and Orders; *i.e.*, the various forms of delegated legislation.

Committee in its suggestion that the forms of laying be reduced to two: *i.e.*, procedure by way of affirmative or by way of negative resolution. The many cases where regulations are merely required to be laid, with no further directions, or where they are required to be laid in draft still continue. Yet, even here, some standardization is effected. Thus, with regard to Instruments required to be laid in draft, the period of laying is standardized at forty days, during which either House may annul the draft Instrument by negative resolution. In addition, with regard to all Instruments subject to the negative-resolution procedure, the forty-day period specified for laying is expressly declared to consist only of sitting days, thus clearing up a point on which difficulty has sometimes occurred.

The general statutory provision with regard to the laying of delegated legislation before Parliament has been to the effect that such Instrument "shall, so soon as may be after they are made, be laid before each House." The interesting point then arises regarding what are the legal effects of a failure to comply with the statutory requirement; *i.e.*, of the failure of the agency concerned to "lay." That this is not a wholly theoretical problem is shown by the inadvertence of the Home Office during the war in failing to lay a whole series of National Fire Service Regulations as required by the enabling act. Possible legal consequences of that omission were avoided by the passage of an Indemnity Act <sup>29</sup> under which the regulations were to be deemed to have been duly laid as required by the statute under which they were made. Sir William Graham-Harrison was of the opinion that "a direction that Rules are to be laid before Parliament is directory only"; <sup>30</sup> that is, failure to "lay" does not invalidate the delegated legislation. Dr. Allen is also of this opinion, although conceding that "it is a little startling to say that a command to lay Ministerial regulations before the Legislature is 'a mere instruction

<sup>29</sup> 7 & 8 Geo. VI, c. 35 (1944).

<sup>30</sup> Minutes of Evidence, 37.

for the guidance and government of those on whom the duty is imposed.”<sup>81</sup> One might, however, logically assert that the legislative requirement here is “mandatory”—that failure to comply with it invalidates the delegated legislation. If laying is of any value as a check upon the Executive, its requirement should be strictly enforced. The failure to comply here should go to the “essence” as much as those defects in formal procedure which our courts have often held to invalidate transactions.<sup>82</sup> The point, at any rate, seems to be settled in favor of this view by Section 4 (1) of the Statutory Instruments Act, which provides that, where “any statutory instrument is required to be laid before Parliament after being made, a copy of the instrument shall be laid before each House of Parliament and . . . shall so be laid before the instrument comes into operation.”<sup>83</sup>

The procedure of the two Houses with regard to delegated legislation laid before them is similar, though not identical. In the House of Lords, notice of all papers presented to the House, including both regulations and draft regulations, appears in the first instance in the Minutes of Proceedings. A separate list, printed fortnightly, informs the peers of the statute under which each paper is so laid, the number of days for which it is required to lie, and the date when it was laid. The Instruments themselves are available for inspection in the Printed Paper Office. The procedure in the House of Commons is basically similar. When papers are laid there, notice appears in the daily Votes and Pro-

<sup>81</sup> *Op. cit. supra* note 4, at 110.

<sup>82</sup> See *id.* at 109. In asking for the passage of the Indemnity Act, Mr. Morrison, the then Home Secretary, expressly left open the question of whether the National Fire Service Regulations had been invalidated by the failure to lay, saying that “only the courts can settle that issue authoritatively.” 402 H. C. Deb. 5s., col. 1215. Influenced by this incident, some magistrates refused to enforce certain regulations unless assurances were given that they had been laid. For an example of such refusal, see *The Times* (London), Aug. 1, 1944, p. 2, col. 5.

<sup>83</sup> There is an exception in this section for cases where “it is essential that any such instrument should come into operation before copies thereof can be so laid.” The Solicitor-General was, however, of the opinion that this section did not make “laying” a condition precedent to validity. 417 H. C. Deb. 5s., col. 1176.

ceedings, and a separate list, published weekly and supplied to any member who desires it, shows, in regard to those rules and orders against which motions for annulment can be moved within a statutory period, the relevant statute, the number of days, and the date of laying. The laying of rules and orders on the table of the House of Commons means in practice that the paper is placed in the Library of the House. The document is usually laid in duplicate, one copy being placed on a central table in the Library where it is always available for members' inspection.<sup>34</sup>

The effectiveness of the safeguards of laying have in the main depended upon the vigilance of the individual member. The actual opportunities available to an interested member for raising objections to particular delegated legislation depend both upon the laying category under which it comes and upon the House of which he is a member. The House of Lords, in the Earl of Donoughmore's phrase, is "master of its own time,"<sup>35</sup> and a peer can always direct the attention of the House to delegated legislation lying on the table by moving for papers or by asking a question. In the case of Statutory Instruments subject to annulment, any peer can move the resolution to annul and, if necessary, divide the House.

Members of the House of Commons are not so fortunate. The chief difficulty there is one of time. Any member can move a motion (technically in the form of a "prayer") to annul a regulation or draft regulation. Where the Instrument in question is made liable to annulment within a stated period by the enabling act, such motion, being "proceedings made in pursuance of any act of parliament" under Standing Order No. 1 (6) of the House of Commons, is "exempted business," and not subject to the so-called "eleven-o'clock rule"; *i.e.*, it can be taken after 11 P.M. exempt from interruption by the Speaker, and admits of a di-

<sup>34</sup> See May's Parliamentary Practice (14th ed. 1946) 807-8.

<sup>35</sup> Minutes of Evidence, 7.

vision. As the time after 11 P.M. is about the only opportunity available for proceeding upon such motions, there is some practical difficulty in the way of effectively accomplishing anything, in view of the lateness of the hour. "You can always bring your motion on, but at eleven o'clock you may not get a good House to debate it."<sup>36</sup> It is difficult to arouse much interest in such cases unless some important political issue is involved.

Apart from such "prayers" which may be moved as "exempted business" an M.P. who seeks to object to particular delegated legislation "must find time during the ordinary sittings of the House, which as a rule is impracticable."<sup>37</sup> All that the member can do is to raise the question on the motion for the adjournment, but the time available is strictly limited—only that between 11 and 11:30 P.M., when the Speaker usually adjourns the House and no division is allowed. "Otherwise he can only hope to wring from the Government an allocation of time during the ordinary business of the House, and that is a rare privilege, the more so in this case because no Minister is likely to grant time for attacking one of his own powers or ordinances."<sup>38</sup>

The interested member can, of course, freely avail himself of the opportunities of question time for airing his objections. It is true that a question asked in the House of Commons does not have anything more than a "ventilating" effect<sup>39</sup>—"it is very useful, perhaps, as initiating some further action, but not in itself can it be regarded as a method of control"<sup>40</sup>—nor can a debate take place on it as is the case in the House of Lords. But it is important not to dismiss too lightly the Parliamentary question as an instrument of legislative control. Most observers agree that the fear of having his minister brought to task by a

<sup>36</sup> Sir Maurice L. Gwyer, *Minutes of Evidence*, 7.

<sup>37</sup> Report of the Committee on Ministers' Powers, 44.

<sup>38</sup> Allen, *op. cit. supra* note 4, at 92.

<sup>39</sup> *Id.* at 88.

<sup>40</sup> Sir Gilbert Campion, Select Committee on Procedure, *Minutes of Evidence*, 360.

question in the House is one of the chief forces motivating the conduct of the British civil servant. "The ordinary administrator is a timorous fowl. The one thing he wants more than anything else is to keep his Minister out of a row."<sup>41</sup> A question asked in the House may thus have a very considerable influence upon the department concerned. At the same time, one cannot deny that the question, like so many other weapons in the Parliamentary armory, has become of diminishing importance in controlling the Executive. The characterization of it as "largely ineffective" by so informed an observer as the Clerk of the House of Commons<sup>42</sup> is significant in this respect. The casual onlooker cannot help but feel that there is some truth in Miss Ellen Wilkinson's conclusion that "it is the job of the skilled answerer of the questions to produce an answer which will (a) soothe the House of Commons, and (b) give the impression that the questioner is rather a fool, and then everyone is perfectly satisfied."<sup>43</sup>

Even more important than these difficulties arising out of the lack of opportunities for the member to raise objections to delegated legislation are those growing out of the bulk and technicality of regulations and orders. "A permanent official always speaks about the matter coming before Parliament as though that were in fact a real safeguard, but when the average Member of Parliament is expected to have expert knowledge on all subjects from the Charing Cross Bridge to diseases in potatoes, all in the same day, is it not a fact that all this so-called criticism is in fact a farce?"<sup>44</sup>

The laying procedure has not, therefore, been very effective in practice as a means of assuring Parliamentary control over delegated legislation. "Control by Parliament, however complete in theory, is at the present time ineffective in practice," asserted

<sup>41</sup> Sir Claude Schuster, *Minutes of Evidence*, 48.

<sup>42</sup> *Op. cit. supra* note 40, at 360.

<sup>43</sup> *Minutes of Evidence*, 259.

<sup>44</sup> Miss Wilkinson, *id.* at 11.

Sir Dennis Herbert,<sup>45</sup> and his view was adopted by the Donoughmore Committee. "The facilities afforded to Parliament to scrutinise and control the exercise of powers delegated to Ministers are inadequate; there is a danger that the servant may be transformed into the master."<sup>46</sup>

Perhaps the chief weakness of the laying procedure has been in its reliance upon the watchfulness and initiative of the individual M.P. But effective scrutiny on the part of the individual member has become increasingly impracticable because of the ever-growing volume of delegated legislation and the difficulties of procedure described above. The "quantity and complexity [of regulations] are such that it is no longer possible to rely for such scrutiny on the vigilance of private Members acting as individuals. A system dependent on human initiative is liable to break down, and the best security for the effective working of any system is machinery which is automatic in its action."<sup>47</sup>

What was needed was the creation of machinery to make Parliamentary control more effective. The Donoughmore Committee consequently urged the establishment in each House of a standing committee charged with the duty of scrutinizing delegated legislation. Similar suggestions had been made even before that time, and there was an existing precedent in the House of Lords procedure relating to regulations and orders requiring an affirmative resolution. In the House of Commons, such regulations are treated similarly to those subject to the negative-resolution procedure. Being "exempted business," they may, though opposed, be taken after 11 o'clock, and are, in fact, almost invariably agreed to at that time, the necessary resolutions being rushed through en masse, with little actual consideration by the House. The House of Lords, on the other hand, feeling that regulations and orders which require an affirmative resolution should not be

<sup>45</sup> *Id.* at 228.

<sup>46</sup> Report, 53.

<sup>47</sup> *Id.* at 63.

passed as a mere formality, set up a so-called "Special Orders Procedure" in 1924. Under this, a sessional committee of the House examines such regulations and orders and reports, in effect, whether the provisions raise important questions of policy or principle, how far they are founded on precedent, and whether there should be any further inquiry before the resolution is moved.<sup>48</sup>

The Donoughmore Committee, relying largely on a detailed memorandum by Sir Dennis Herbert,<sup>49</sup> recommended the extension of this type of machinery to all delegated legislation required to be laid before Parliament.<sup>50</sup> This suggestion was strongly opposed by most of the witnesses before the Committee, even so normally restrained an observer as Sir William Graham-Harrison asserting: "It seems to me quite impossible for any Committee to get through the work within any reasonable limits of time."<sup>51</sup> The same opinion was held by the various government departments, which, in response to requests to give effect to the Donoughmore Committee proposal, gave repeated assurances "that it was impracticable and undesirable to appoint a Committee of this kind, and that it would in any case be ineffectual."<sup>52</sup> The pressure in favor of such a committee, however, continued to grow, influenced no doubt by the increasing impracticability of effective Parliamentary scrutiny of the tremendous mass of war regulations. Finally, a debate on a motion introduced in May 1944 for the appointment of such a committee—aptly characterized by *The London Times* as "the latest issue of a line which now has a respectable antiquity"<sup>53</sup>—led to the Government's agreeing to appoint such a committee for the House of Commons, though rejecting the proposal for a joint select committee

<sup>48</sup> May's Parliamentary Practice, 809, 985-86.

<sup>49</sup> Minutes of Evidence, 231.

<sup>50</sup> Report, 67.

<sup>51</sup> Minutes of Evidence, 43.

<sup>52</sup> Allen, *op. cit. supra* note 4, at 96.

<sup>53</sup> May 16, 1944, p. 5, col. 2.



of both Houses suggested by Lord Soulbury in a letter to *The Times*.<sup>54</sup>

The Select Committee on Statutory Instruments (originally known as the Select Committee on Statutory Rules and Orders), as constituted in accordance with Mr. Herbert Morrison's pledge on behalf of the Government, consists of some twelve M.P.'s. Its terms of reference enable it to scrutinize all Statutory Instruments laid or laid in draft before the House, upon which proceedings may be taken in either House in pursuance of any act of Parliament; *i.e.*, those that either require an affirmative resolution or are exposed to annulment on a negative resolution. The Committee is empowered to consider any such Statutory Instrument with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds:

(i) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any Government Department or to any local or public authority in consideration of any licence or consent, or of any service to be rendered, or prescribes the amount of any such charge or payments:

(ii) that it is made in pursuance of an enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specified period:

(iii) that it appears to make some unusual or unexpected use of the powers conferred by the Statute under which it is made:

(iv) that it purports to have retrospective effect where the parent Statute confers no express authority so to provide:

(v) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament:

(vi) that there appears to have been unjustifiable delay in sending a notification to Mr. Speaker under the proviso to subsection (1) of section four of the Statutory Instruments Act, 1946, where an Instrument has come into operation before it has been laid before Parliament:

<sup>54</sup> May 17, 1944, p. 5, col. 5.

(vii) that for any special reason, its form or purport calls for elucidation.

The Committee is given the power to require any department to submit a memorandum explaining any Statutory Instrument under their consideration or to depute a representative to appear before them as a witness to explain any such Instrument. Indeed, the Committee may not report that the special attention of the House should be drawn to any Statutory Instrument without affording the department concerned an opportunity of furnishing orally or in writing such explanation as they think fit. The normal procedure is for such explanations to be transmitted to the House together with the report of the Committee.

It is difficult even for an interested outsider to get an adequate picture of the work of the Scrutiny Committee. The Committee meets about once every two weeks. Prior to such meetings, the members are furnished with copies of the Statutory Instruments laid which come within their terms of reference, together with a memorandum from Sir Cecil T. Carr, the Counsel to Mr. Speaker, dealing with the various Instruments on which he has thought it worth while to comment. Under the Committee's Order of Reference, it is to have the assistance of the Counsel to Mr. Speaker, and his aid has, indeed, proved invaluable. It is, to put it mildly, not a simple matter for those members who are not lawyers to find their way through the language of much of the delegated legislation that comes before them, much less to understand their full legal implications. Thus, Sir Charles MacAndrew, describing the difficulties of a nonlawyer in handling these Instruments, plaintively asserts: "Looking through all these things is really a life's work."<sup>55</sup> The help of a trained observer like Sir Cecil Carr, who has had probably more experience with delegated legislation than anyone else in Britain, is essential if the Committee is to accomplish anything.

<sup>55</sup> Select Committee on Procedure, Minutes of Evidence, 248, from which this account of the work of the Committee is largely derived.

The Committee's procedure at its meetings seems to be quite informal. The Instruments to be considered are put to the members from the chair, and there is normally some comment on most of them before the Committee's decision. Those on which Sir Cecil Carr has commented in his memorandum are explained by him and then discussed among the Committee. If they think that, under their terms of reference, some notice should be taken, they require the department concerned either to submit an explanatory memorandum or to depute a witness to appear before them. Often departmental memoranda are considered and witnesses examined, and the Committee must then decide whether they will draw the attention of the House to the particular Instrument or accept the explanation given. In this way, all of the Statutory Instruments are gone through at the meeting.

The function of the Scrutiny Committee, as conceived of in the Donoughmore Committee proposals, was to act as a source of information to Parliament. "In other words the task of the Committee would not be to act as critic or censor of the substantive proposals . . . but to supply the private Member with knowledge which he lacks at present, and thus enable him to exercise an informed discretion whether to object or criticise himself."<sup>56</sup> The Committee was to be precluded from considering the merits of the Instruments before them, and the terms of reference of the Select Committee on Statutory Instruments, as finally set up, were deliberately framed with this end in view.<sup>57</sup> As quaintly put by an M.P.: "All the Statutory [Instruments] Committee does is to have very narrow terms of reference, without saying this is a good way of dealing with a particular sick patient or what not."<sup>58</sup>

<sup>56</sup> Report, 63.

<sup>57</sup> Sir Cecil T. Carr, Select Committee on Procedure, Minutes of Evidence, 244.

<sup>58</sup> Captain Crookshank, *id.* at 149. Nor is the Committee intended to go into the legal question of whether Instruments coming before it are *ultra vires*. In this, it differs from the Special Orders Committee of the House of Lords. May's Parliamentary Practice, 986.

The Committee is thus intended not to reopen discussion that might touch upon the policy of the parent act. Yet, as Sir Cecil Carr has pointed out, by authorizing the Committee to report on "unusual or unexpected use" of a statutory power, the Order of Reference permits the consideration of aspects not far removed from policy and merits.<sup>59</sup> The distinction between the two in specific cases is illustrated by Sir Cecil as follows: "The line taken from the beginning has been: if you have a price-fixing order for potatoes or whatever you like, and the price goes up 2d. or down 2d., that is policy and merits, but, if you found it went up suddenly by 10s., that was something you might regard as an unusual or unexpected use of the power."<sup>60</sup>

The Air Navigation (Amendment) (Ministry of Civil Aviation) (Provisional) Order, 1945, is an example of a Statutory Instrument that was found to be within the "unusual or unexpected use of the power" category, and the Scrutiny Committee accordingly reported that the attention of the House should be drawn to it on that ground.<sup>61</sup> The Order, though dated October 30, 1945, was under paragraph 2 to be "deemed to have effect as from the date of the passing of the Ministry of Civil Aviation Act, 1945,"<sup>62</sup> and it was to this retrospective aspect that the Committee drew attention. As explained by the Ministry, it was the intention that from the date of the 1945 act the Minister of Civil Aviation should have all the powers previously exercised by the Secretary of State for the purposes of civil aviation under the present Order and other Orders specified in its schedule. Those powers had not, however, been transferred to the Minister by the Act of 1945, and the retrospective provision in the Order was intended to ensure the validity of action taken on behalf of the Minister for any purpose of the Order since the date of the Act.

<sup>59</sup> *Op. cit. supra* note 57, at 244.

<sup>60</sup> *Id.* at 250.

<sup>61</sup> Seventh Report (1946).

<sup>62</sup> 8 & 9 Geo. VI, c. 21.

This would seem to be a valid justification of the provision in question from the point of view of the merits, but, as the Scrutiny Committee pointed out: "Your Committee are not concerned with the merits of the ante-dating of this amending Order."<sup>63</sup> What did concern the Committee was that the delegate had purported to give a retrospective effect to its order, although this was not expressly sanctioned by the enabling act. Indeed, the possibilities of abuse in such a practice are so great that the Committee drew attention to the problem in one of its Special Reports. "In occasional instances Statutory [Instruments] purport to have retrospective operation. Where this has been expressly sanctioned by the parent statute . . . Your Committee have no comment to submit . . . But they feel strongly that Statutory [Instruments] should not purport to have retrospective operation unless Parliament has expressly so provided."<sup>64</sup> In accordance with a later report of the Committee,<sup>65</sup> the occurrence of a retrospective provision of the type of the 1945 Air Navigation Order was added to the Committee's Order of Reference as the fourth head.

With regard to the other headings of the Scrutiny Committee's terms of reference, no reports have yet been made under the first head (imposition of a charge) or the second (exclusion of the jurisdiction of the courts). As Dr. Allen has pointed out, the lack of cases under the second head may be due to the comparative rarity of provisions like the "conclusive-evidence" clause which expressly exclude the jurisdiction of the courts. "Hardly ever do either enabling Acts, or Instruments made under them, contain 'specific provisions' exempting them from legal challenge."<sup>66</sup> The difficulties arise out of the interpretation of debatable clauses in the parent legislation, such as the formula that regulations shall have effect "as if enacted in this Act," and

<sup>63</sup> Second Special Report (1945).

<sup>64</sup> *Ibid.*

<sup>65</sup> Third Special Report (1946).

<sup>66</sup> Select Committee on Procedure, Minutes of Evidence, 265.

these would not seem to come within the Committee's Order of Reference.

The majority of instances where the attention of the House has been drawn to Statutory Instruments has been under the heading of delay in laying or publication. The practice of the Committee has been to require an explanation from the rule-making authority in all cases where the Instrument has not been published and laid before the House within seven days of signature. Although many cases of such unjustifiable delay have been noted, evoking frequent comment in the Special Reports of the Committee, their strictures seem to have had some effect, for the Committee has been able "to record a notable improvement in punctuality."<sup>67</sup> Reports drawing the attention of the House have been much less frequent under the seventh head of the Order of Reference; *i.e.*, that the Instrument's form or purport calls for elucidation—somewhat surprising in view of the oft-heard complaints against the obscurity of language of delegated legislation.<sup>68</sup>

In addition to its main work of scrutinizing delegated legislation and informing the House of particular cases that come within its terms of reference, the Committee has also issued a number of Special Reports dealing with various problems in the field. These have often proved most valuable. Thus, the criticism by it of the Rules Publication Act, 1893, and suggestions for improvement<sup>69</sup>—reviving one of the neglected parts of the Donoughmore Committee Report—led directly to the Statutory Instruments Act, 1946. Most of these Special Reports have dealt with technical features of the laying and publication procedure, and useful suggestions have been made mainly with a view toward clarification and simplicity. To illustrate: One of these reports recommended that Statutory Instruments should be cited by short

<sup>67</sup> Third Special Report (1946).

<sup>68</sup> See, *e.g.*, the remarks of Lord Goddard, C.J., in *Brierly v. Phillips*, [1947] K. B. 541, 542.

<sup>69</sup> Professor Wade, Select Committee on Procedure, Minutes of Evidence, 293.

titles, and a subsequent report gave some of the details of this recommendation, asserting that a great deal of space could be saved in lists, indexes, and references if short titles were limited to one line. "Not every instrument, naturally, can have so compendious a name as 'The Cucumbers Order' or 'The Spoilt Beer Regulations', but ingenuity might usefully be employed to cut down such cumbrous labels as 'The Artificial Insemination (Importation and Exportation of Semen and Artificial Semen) Regulations', 'The Control of Fuel (No. 3) Order, 1942, General Direction (Central Heating and Hot Water Plants) No. 6', or 'The Compensation of Displaced Officers (War Service) (Forms for Teachers) Regulations'." <sup>70</sup>

In August 1945, a Select Committee was appointed to consider the procedure in the public business of the House of Commons. In the course of this Committee's inquiry, Sir Gilbert Campion, the Clerk of the House, was invited and undertook to prepare a comprehensive scheme for the reform of Parliamentary procedure. In this connection, of especial interest to us are his recommendations for improving the machinery for assisting the House to scrutinize delegated legislation. He makes two main suggestions with regard to the work of the Select Committee on Statutory Instruments: "(1) It might be considered whether the select committee's order of reference should be extended to enable it to report also on the merits of a Statutory Instrument, as an exercise of the powers delegated . . . (2) Consideration might also be given to empowering the select committee to inquire into and report on any grievances arising out of Instruments *actually in operation*, whether or not the statutory period during which the control of the House could be exercised had expired." <sup>71</sup>

It will be recalled that the Order of Reference of the Scrutiny Committee was deliberately framed to exclude consideration of

<sup>70</sup> Third Special Report (1946).

<sup>71</sup> Select Committee on Procedure, Appendix to Third Report, xlv.

the merits of Statutory Instruments. The Committee was to be, in the characterization of the Earl of Donoughmore, in effect, a "Vigilance Committee."<sup>72</sup> Consideration of delegated legislation on the merits would inevitably involve some duplication of the work of the department responsible for the Instrument and even, perhaps, the rehearing of interested parties.<sup>73</sup> In addition, a consideration of the merits of delegated legislation would almost necessarily involve the merits of the parent act. Even Sir Gilbert admits this, conceding that "in some cases it would be very difficult to criticise the Instrument without criticising the enabling Act."<sup>74</sup> The Committee would thus become an arena of party controversy:<sup>75</sup> "as soon as merits arise, policy must be discussed and the Committee must be divided into the Government and Opposition."<sup>76</sup> Every regulation coming before the Committee would tend to involve some repetition of the Parliamentary struggle over the enabling act. "If you had an act about (we will say) food control, Parliament would have decided on the fact that there should be control and on the kind of control, and then you would have an order made under that, and I can imagine that there might be a good deal of discussion on the merits of the order which might raise very much the kind of consideration (possibly you could not disentangle it) which had been material on the discussion of the bill."<sup>77</sup> This would tend to destroy one of the chief merits of the Scrutiny Committee: the fact that it has been able to do its work "semijudicially," along nonparty lines.<sup>78</sup> Division on the merits would almost always mean division along party lines.

One cannot help but feel more sympathy with Sir Gilbert's

<sup>72</sup> Minutes of Evidence, 235.

<sup>73</sup> Report of the Committee on Ministers' Powers, 63.

<sup>74</sup> *Op. cit. supra* note 71, at xlv.

<sup>75</sup> Allen, Select Committee on Procedure, Minutes of Evidence, 262.

<sup>76</sup> Sir Charles MacAndrew, *id.* at 246.

<sup>77</sup> Sir Cecil Carr, *id.* at 247.

<sup>78</sup> *Op. cit. supra* note 76, at 246.



second suggestion; *i.e.*, that the Committee on Statutory Instruments function as a "committee of grievances" to hear complaints of hardship arising out of the operation of delegated legislation. One of the chief weaknesses of the present system is the lack of an adequate forum where the ordinary citizen can "ventilate" his complaints against specific administrative abuses. It is all very well to say, with Dr. Allen, that "the proper method for the redress of grievances under delegated legislation is recourse to the courts of law";<sup>79</sup> but this ignores the practical limits of a system of judicial control which, as we shall see, is based upon the jurisdictional theory of review. The difficulties in Sir Gilbert's proposal, here, lie also in its actual operation in practice. One cannot do better than quote Sir Cecil Carr on this: "It is difficult to comment without knowledge of the contemplated scope of the proposal. Cases of hardship may arise by hundreds, if not thousands. How are they to be sifted? Will every discontented motorist be allowed to complain of the application of the Control of Motor Fuel Order? Will every householder be allowed to raise his troubles over the restriction on repairs or the delay in de-requisitioning of premises? A single petitioner appearing in person might well occupy several days with objections to a regulation or order (for example, the Motor Vehicles (Construction and Use) Regulations). It will be difficult to deal with particular cases without study of official correspondence and perhaps departmental files; will these be made available?"<sup>80</sup>

Sir Gilbert Campion's proposals, even if adopted, could not be effectuated without a revision of the present scrutinizing machinery. From the point of view of volume of work, the Committee on Statutory Instruments, as at present constituted, clearly could not do the job adequately. As stated by one of its members: "Any extension of the terms of reference might look very well on paper as an administrative matter, but unless the

<sup>79</sup> *Id.* at 263.

<sup>80</sup> *Id.* at 244.

Committee were very much enlarged, or a number of committees appointed, it would not mean any more effective scrutiny than there is at present.”<sup>81</sup> The volume of work under the present Order of Reference is such that the burden on the Committee is quite heavy, as it is. One, indeed, gets the impression that the Committee does just barely manage to go through the Instruments that come before it, and only that by dint of great effort on the part of all concerned. In particular, the strain upon the Counsel to Mr. Speaker seems unduly great, as much of the Committee’s work depends upon him. This is, to some extent, unavoidable in a committee composed of part-time legislators, which could not function without his expert aid. But, still, efforts should be made to ease his burden by the appointment of an adequate staff to assist him.

Sir Gilbert’s suggestions do have the merit of focusing Parliamentary attention upon the problem of Parliamentary control of delegated legislation and upon existing inadequacies in machinery and method. One of the defects of the existing procedure to which attention has often been drawn lies in the inability of Parliament to amend Statutory Instruments laid before it: it must either approve or annul the instrument *in toto*. “At the present time any Member who objects to a statutory order has no course open to him except to move for its annulment, whereas he may not want to reject it altogether; he may merely want to make a change in it, and the minister or department concerned might have no particular objection to that; in fact, it might be very convenient for them to have that change made.”<sup>82</sup> The objection most frequently raised against allowing Parliament to modify delegated legislation laid before it is the possibility of disagreement between the two Houses. As stated by Sir William Graham-Harrison: “The difficulties which would arise if different modifications were made by each House (and also in other ways)

<sup>81</sup> Sydney Silverman, *id.* at 151.

<sup>82</sup> Allen, Select Committee on Procedure, Minutes of Evidence, 273.

may easily be imagined, and in fact, the provision is quite impossible to work."<sup>83</sup>

Yet this objection alone is not insuperable. In certain cases of delegated legislation subject to affirmative resolutions, the required resolutions can be moved "with modifications,"<sup>84</sup> and where difficulty has arisen in co-ordinating the action of both Houses suitable arrangements have been worked out. Thus, orders under the Government of India Act, 1935,<sup>85</sup> were to be laid subject to an address by both Houses "praying that the Order may be made either in the form of the draft, or with such amendments as both Houses of Parliament may have agreed to recommend to His Majesty." In order to reduce the possibility of conflicting decisions, it was informally agreed, in the case of motions for addresses to approve such orders, that debate on the address in the Commons should always be adjourned till the Lords Select Committee on India and Burma Orders had reported to the House of Lords. Then, if the order was amended by the Lords, the same amendments could be moved in the Commons before the address was finally agreed to.<sup>86</sup>

An even more effective means of ensuring agreement between the two Houses would be the establishment of a joint select committee of both Houses to scrutinize Statutory Instruments. The amendments passed on by Parliament would then be those recommended by such committee in practically all cases, and the problem of disagreement between the two Houses would not arise. As we have already mentioned, however, a proposal for such a joint committee suggested by Lord Soubury was rejected by Mr. Morrison in his speech agreeing to set up the Scrutiny Committee in the Commons.

<sup>83</sup> Minutes of Evidence, 36.

<sup>84</sup> *E.g.*, Ministry of Health Act, 1919, 9 & 10 Geo. V, c. 21, § 8 (3); Government of India Act, 1919, 9 & 10 Geo. V, c. 101, § 44. Under the Nurses Registration Act, 1919, 9 & 10 Geo. V, c. 94, § 3 (4), rules laid before Parliament "may be annulled or modified."

<sup>85</sup> 25 & 26 Geo. V, c. 42, § 475.

<sup>86</sup> May's Parliamentary Practice, 807.

All the methods of Parliamentary control which we have been discussing enable Parliament to retain some check over the exercise of sublegislative powers that have been delegated to the Executive. They are attempts to deal with Sir Dennis Herbert's accusation against the House of Commons "that it allows Government Departments to do things without knowing what is being done."<sup>87</sup> But, even apart from the question of their effectiveness in practice, they are directed to only one side of the problem. Of no less importance is the need for Parliament to exercise discretion in its grant of powers to the Executive, especially with regard to those types of delegated legislative powers which the Donoughmore Committee classified as *exceptional*. If Executive power is to be confined within reasonable bounds, Parliament must strive to keep its grants of authority to the *normal* category of delegated legislation. The essentially subordinate character of delegated legislation derives from the limitation of the power delegated by the terms of the enabling act. It therefore follows that, if this subordinate character of delegated legislation is to be maintained, Parliament must delimit the authority granted, and define these limits in clear language.

Under the present system, the Parliamentary machine is not competent to perform this task. With the increasing pressure upon Parliamentary time and the pushing through of legislation as a matter of party loyalty, proposals for conferring powers of delegated legislation upon the Executive do not receive the careful consideration they merit. The tendency is to think of them as pure machinery provisions, to be adopted as a matter of course once the Parliamentary battle has been fought over the broad questions of policy contained in the enabling act.

Theoretically, this function of scrutinizing bills conferring powers of delegated legislation is performed during the committee stage of such bills. The function of a committee on a bill is to go through the text of the bill clause by clause, and, if

<sup>87</sup> Minutes of Evidence, 238.

necessary, word by word, with a view toward making such amendments in it as may seem likely to render it more generally acceptable.<sup>88</sup> This task, if adequately performed, should ensure due consideration of delegations of legislative power. In practice, however, such grants are not sufficiently scrutinized during the committee stage. The difficulties here are well put by Dr. Allen: "In a long and complicated Bill it is not uncommon to find subordinate legislation and judicial powers scattered about in different sections of the Bill; and they are sometimes distributed not among one or two delegates, but among a considerable number. Now, the Committee stage of any lengthy and contentious Bill is nearly always conducted under extreme pressure of time, and not infrequently it is only by application of the guillotine or 'kangaroo' closure that it can be completed within reasonable time; . . . In these circumstances it needs vigilance for Members to follow and check, and it is almost impossible for them to amend, every delegation of power. In other Bills it will be found that the Departmental powers are concentrated in one or two clauses which come at or near the end of the enactment. By the time they are reached, and after party passions have expended themselves on the substantive issues of the Bill, there is a marked tendency to allow these clauses to slip through with a sigh of relief that the end is at last in sight. In this manner it is easy for subordinate powers to accumulate through sheer *vis inertiae*."<sup>89</sup>

It was to enable Parliament to exercise an informed judgment in its grants of powers of delegated legislation that the Donoughmore Committee, in its recommendation for the establishment of a Scrutiny Committee, proposed that that Committee should be charged with the duty of scrutinizing every bill containing any proposal for conferring legislative powers on ministers, as

<sup>88</sup> May's Parliamentary Practice, 506.

<sup>89</sup> Allen, *op. cit.* *supra* note 4, at 89.

well as Instruments made in the exercise of such powers.<sup>90</sup> Every bill was to stand referred to the Committee as soon as read a first time. After the Committee had considered the bill, it was to report to the House with regard to proposals therein for conferring lawmaking powers upon the Executive. The terms of reference suggested upon which the Committee could draw the attention of the House were, in general, modeled upon what the Donoughmore Committee considered as *exceptional* types of delegated legislation. The object of this aspect of the work of the Committee would thus be to inform the House of the nature of the legislative powers that it was proposed to delegate. Without passing on the merits, it was to point out the cases where sublegislative powers of an exceptional nature were being conferred.

The examination of bills by a committee working on the same nonparty basis as the present Scrutiny Committee would ensure that adequate attention was given to certain forms of delegations. Proper scrutiny here would explain to the House the effects of enabling clauses in proposed legislation. At the present time, it is at least doubtful whether Parliament really is aware of the extent of the lawmaking power that is often delegated. "It is much open to question whether Members, in passing without challenge the enabling clauses of a Bill, are always aware of the effects which will flow from the enabling words."<sup>91</sup> This is especially true of cases where the precise limits of the powers conferred are not clearly defined; *i.e.*, where the discretion conferred is not canalized by ascertainable standards. It is true that, since the Donoughmore Committee Report, certain obviously undesirable forms of delegation, expressed in formulas such as the "effect as if enacted in this Act" or the "conclusive-evidence" clauses, would be subject to the strongest criticism by members on all sides. But the same result is accomplished when delega-

<sup>90</sup> Report, 67.

<sup>91</sup> Allen, Select Committee on Procedure, Minutes of Evidence, 264.

tions are conferred in language so broad that it is impossible to ascertain what limits Parliament did intend to impose. The *vires*, here, are so broad as to exclude judicial control even more effectively than if one of the express formulas had been used.

Though Parliament has the power to confer such broad authority upon the Executive in its discretion, it is of the utmost importance that this should not be done in ignorance. And under the present system, as has been indicated, Parliament is often not fully aware of the extent of the power conferred. The conclusion of the Committee on Ministers' Powers on this is as significant today as it was in 1932. "We doubt, however, whether Parliament itself has fully realised how extensive the practice of delegation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused."<sup>92</sup> It was to remedy this state of legislative unawareness that the Donoughmore Committee recommended that its proposed scrutinizing committee also inform the House of the nature of proposed delegations. The Scrutiny Committee, as established, however, deals only with Statutory Instruments laid before the House, and there is still no adequate scrutiny of proposals to delegate legislative power.

The methods of Parliamentary control over delegated legislation that have been developed in Britain can have no direct American counterparts. This is precluded by the differing constitutional position of the legislature in both countries. Control of the Executive on this side of the Atlantic is left more to the courts of law, and Congress is not thought of as being responsible even for the limited supervision over delegated legislation that Parliament exercises.

Yet this is not to say that our legislature should not take a more active role in controlling administrative lawmaking. As Dean Landis points out, the English techniques have several virtues. "For one thing, they bring the legislative into close and

<sup>92</sup> Report, 24.

constant contact with the administrative.”<sup>93</sup> An M.P. who wishes to object to some regulation or order can do so directly on the floor of the House. The individual congressman, on the other hand, can only place his objections before the administrative agency concerned. If the agency refuses to meet the objection, he can seek to bring indirect pressure against it; there is no direct machinery for Congressional annulment of particular regulations analogous to the negative-resolution technique.

The English laying procedure has, indeed, not been unknown in American practice. One example that readily comes to mind is the Reorganization Act of 1939,<sup>94</sup> which gave the President extensive powers to reorganize the Executive branch of the Government. This measure passed only after bitter controversy and with the authority asked for by the President substantially cut down. The laying requirement was inserted as a check upon the power conferred; Presidential reorganization orders were not to be operative for a stated period during which they could be nullified by Congress. This provision did, in fact, enable some Congressional control to be maintained over the power delegated, for the measure was a highly contentious one, and the legislative interest was thus sufficiently aroused to ensure adequate scrutiny of the orders which were laid.

This type of direct legislative supervision is, however, comparatively rare in this country. Control by Congress over the Executive tends rather to be indirect—through the prescription of certain requirements to which the Executive must conform.<sup>95</sup> Although many similar requirements have been prescribed by Parliament, the American practice here goes much further. The Administrative Procedure Act of 1946<sup>96</sup> is an attempt by Con-

<sup>93</sup> The Administrative Process (1938) 77.

<sup>94</sup> 53 Stat. 562.

<sup>95</sup> There are, of course, other indirect pressures in the Congressional control over appropriations, the power of the Senate over appointments, and the threat of Congressional investigations.

<sup>96</sup> 60 Stat. 237.



gress to deal with the field as a whole and to prescribe certain minimum standards to which administrative procedure must conform. This Act, which has been said to mark "the beginning of a new era in administrative law"<sup>97</sup> in this country, is largely based upon the recommendations of the Attorney General's Committee on Administrative Procedure. Its effect is not revolutionary; it adopts, in large measure, the best existing administrative practice. What is important, however, is that it states the essentials of such practice in statutory form and imposes the best existing practice upon the administrative process as a whole. Uniform standards of fairness are thus prescribed for all federal administrative action.

In the first place, there is the requirement of administrative publicity. One of the great difficulties for students of administrative law and practitioners on both sides of the Atlantic has been the lack of adequate public information on the subject. The situation in this country is aptly described by the Attorney General's Committee. "The staff of the Committee has had to labor industriously for a year or more in order to describe the procedures of a selected group of agencies, without attempting to analyze the substantive principles upon which the agencies act. There are comparatively few works on 'administrative law', and even fewer which deal with administrative procedure as such. The publications of the agencies themselves are in a number of instances found to be out of date or of too generalized a character. To all but a few specialists, such a situation leads to a feeling of frustration. Laymen and lawyers alike, accustomed to the traditional processes of legislation and adjudication, are baffled by a lack of public information to which they can turn when confronted with an administrative problem."<sup>98</sup>

From the point of view of publicity, the most important thing,

<sup>97</sup> Arthur T. Vanderbilt, in *The Federal Administrative Procedure Act and the Administrative Agencies* (1947) iv.

<sup>98</sup> Report, 25.

of course, is the adequate publication of the delegated legislation itself. For "it would be intolerable if it could be said that obscure clerks in Whitehall poured forth streams of departmental legislation which nobody had any means of knowing. This would be the method attributed to Caligula of writing his laws in very small characters and hanging them up on high pillars 'the more effectually to ensnare the people.'"<sup>99</sup>

A system of publication of delegated legislation has, of course, been in effect in this country for a number of years now and the Administrative Procedure Act has thus not had to deal with this aspect of the publicity problem. Such publication was provided for by the Federal Register Act of 1935,<sup>100</sup> whose provisions were largely modeled upon the system of publication of Statutory Instruments in Britain. The machinery of registering and publishing Statutory Instruments there has until recently been governed by Section 3 of the Rules Publication Act, 1893.<sup>101</sup> "Before that Act was passed, delegated legislation was almost undiscoverable. Part of it was buried in the pages of the 'London Gazette', the arid nature of which still justifies Macaulay's criticism; the rest was scattered over Parliamentary Papers or other departmental documents or files without any definite system."<sup>102</sup> Under Section 3, Statutory Instruments had to be sent to the King's printer "forthwith after they are made," and, in accordance with Treasury regulations, had to be numbered, printed, and sold. Under the existing practice, every regulation sent to the King's printer that is "general" and not "local" in character is printed in separate form. At the end of each year, the Stationery Office publishes a volume containing the text of "general" regulations and a classified list of "local" regulations made in the course of the year and still in force. This volume is

<sup>99</sup> Carr, *Minutes of Evidence*, 208.

<sup>100</sup> 49 Stat. 500.

<sup>101</sup> 56 & 57 Vict., c. 66.

<sup>102</sup> Carr, *Delegated Legislation* (1921) 44.

arranged under subject headings in alphabetical order and is fully indexed, and there is, in addition, an index published at the end of every third year to the Statutory Instruments then in force.

This existing machinery of publication, which was set up in 1893, is continued by Sections 2 and 3 of the Statutory Instruments Act, 1946, and the fact that it has been able to operate for so long with so little friction or change speaks well for its essential soundness. Attention can, however, be drawn to one defect in the earlier statute which is dealt with in the 1946 Act; namely, the failure to prevent noncompliance with the statutory requirement of registration. When the procedure of publication was first adopted in 1893, some of the departments were remiss in their duty promptly to submit rules and orders for registration. Even as late as 1930 Sir Cecil Carr could assert: "Occasionally omissions are still detected, some serious, some trivial."<sup>103</sup> To deal with this situation, he suggested to the Donoughmore Committee that it "might care to consider the suggestion that no rule or order should have any validity until registered,"<sup>104</sup> and the Committee adopted this principle of "no publication, no operation"<sup>105</sup> in its recommendations.<sup>106</sup> A provision in the governing statute that delegated legislation is not to come into operation until published as provided for in the Act can effectively do away with the danger of any such departmental laxity, and such a provision has, indeed, been contained in the Federal Register Act since its enactment. The Statutory Instruments Act does not, perhaps, go as far as that statute, for it does not expressly make publication a condition precedent to validity. Most of the abuses arising from Executive remissness here are, however, taken care of by the provision in Section 2 (3) of the Act that, in any

<sup>103</sup> Minutes of Evidence, 206.

<sup>104</sup> *Ibid.*

<sup>105</sup> Carr, Concerning English Administrative Law (1941) 57.

<sup>106</sup> Report, 66.

proceedings for an offense consisting of a contravention of a Statutory Instrument, it shall be a defense to prove that the Instrument had not been issued by the Stationery Office at the date of the alleged contravention, unless reasonable steps had been taken for bringing its purport to the notice of the public, or of the persons likely to be affected, or of the person charged.<sup>107</sup>

"Antecedent publicity," as the Committee on Ministers' Powers aptly pointed out, "is undoubtedly a safeguard of the highest value particularly where it leads to consultation with the interests concerned."<sup>108</sup> Section 1 of the Rules Publication Act, 1893, aimed at securing such publicity in the case of such "statutory rules" as fell within its scope. Under this section, wherever any statute authorized the making of statutory rules and directed the laying of those rules before Parliament, at least forty days' notice had to be given in the *London Gazette* of the proposal to make the rules, and the notice had to state where copies of the draft rules could be obtained. During the forty-day period, any public body could obtain copies of the draft rules at a reasonable price, and any representations or suggestions made in writing by a public body interested had to be considered by the authority proposing to make such rules before they were finally settled. The Executive practice here was for the department concerned to give notice that the draft was on sale at the Stationery Office and thus, in fact, such draft could be readily obtained not only by "public bodies," but by anyone interested.<sup>109</sup>

The ambit of Section 1 was strictly defined. In the first place,

<sup>107</sup> As Scott, L.J., pointed out in *Blackpool Corp. v. Locker*, [1948] 1 K. B. 349, a serious gap still remains in the British system of publication, for there is no general statutory requirement for the publication of delegated legislation made under powers conferred by a regulation or other legislative instrument not being itself an act of Parliament—*i.e.*, "subdelegated legislation."

<sup>108</sup> Report, 44.

<sup>109</sup> *Id.* at 45.

its provisions did not apply to certain named departments<sup>110</sup> or to Scotland; nor did they affect "statutory rules" that were not required to be laid before Parliament at all, or those required to be laid, or laid in draft, for a period before coming into operation. In addition, many regulations that would otherwise have come within the requirements of Section 1 were excepted by specific provisions in the relevant enabling acts.<sup>111</sup> These "anomalous exceptions"<sup>112</sup> led to some rather curious inconsistencies. Thus, the original purpose of the bill which led to the Rules Publication Act was the securing of prior notice of intention to make rules of court; yet by the Administration of Justice Act, 1925,<sup>113</sup> such rules were expressly exempted from the antecedent publicity requirements of Section 1. The position of the Ministry of Health was even more paradoxical. The Local Government Board was one of the departments originally excluded from the operation of that section. Most of its powers were taken over by the Ministry of Health in 1919.<sup>114</sup> "The Ministry has, of course, acquired a large number of other powers, and it is now a nice question . . . what, in the language of biology, are its inherited and what are its acquired characteristics. The former do not, and the latter do, come within the Rules Publication Act."<sup>115</sup>

In addition to these exceptions, there was "yet another loop-hole of escape from the provisions of section 1, a loop-hole left to meet occasions when emergency or urgency make the delay of the quarantine period undesirable."<sup>116</sup> Section 2 of the 1893 Act provided that, where the rule-making authority certified that on

<sup>110</sup> The Local Government Board, Board of Trade, Revenue Departments, Post Office, and certain rules of the Board of Agriculture.

<sup>111</sup> It has been estimated that the application of the procedure of Section 1 has been specifically excluded in no less than sixty enactments at present in force. 415 H. C. Deb. 5s., col. 1116.

<sup>112</sup> The term used by the Donoughmore Committee, Report, 66.

<sup>113</sup> 15 & 16 Geo. V, c. 28, § 15 (3).

<sup>114</sup> Ministry of Health Act, 1919, 9 & 10 Geo. V, c. 21.

<sup>115</sup> Allen, *op. cit. supra* note 4, at 59.

<sup>116</sup> Carr, *Delegated Legislation* (1921) 35.

account of urgency or any special reason a rule should come into immediate operation, the authority could make the rule come into operation forthwith as a "provisional rule," but such rule was to continue in force only until a normal rule had been made in accordance with the provisions of Section 1. Yet, as Sir Cecil Carr has pointed out, "once rules have been made 'provisional', there is no particular incentive to convert them into non-provisional rules."<sup>117</sup> Complaints were consequently heard that Section 2 was sometimes abused by certifying urgency when there was, in fact, no urgency; as the department was made the judge of the urgency, the courts could hardly examine the merits of such complaints.<sup>118</sup>

The exceptions to Section 1 of the Rules Publication Act were rather arbitrary,<sup>119</sup> and most observers have urged their removal. "If Section 1 is of real value, then, subject to provision being made for prompt action in emergencies, there seems to be no reason why it should not be of universal application."<sup>120</sup> This was also the conclusion of the Donoughmore Committee, which recommended that the "anomalous exceptions" to Section 1 should be removed "so that the section will apply to every exercise of a law-making power conferred by Parliament of so substantial a character that Parliament has required the rule or regulation to be laid before it, whoever may be the rule-making authority concerned and whether the rule or regulation comes into operation before being laid or not."<sup>121</sup> It also suggested that "provisional rules" made under Section 2 should not remain in

<sup>117</sup> *Ibid.*

<sup>118</sup> Carr, Minutes of Evidence, 209. *Cf.* *Rex v. Baggallay*, [1913] 1 K. B. 290, a case of such certification by the Insurance Commissioners constituted under the National Health Insurance Act, 1911, who were not a rule-making authority under the Rules Publication Act, and consequently had no power to make "provisional" rules.

<sup>119</sup> Sir Cecil Carr's characterization, Concerning English Administrative Law (1941) 55.

<sup>120</sup> Carr, Minutes of Evidence, 209.

<sup>121</sup> Report, 66.

force for more than some specified period, to meet the complaints referred to above.

These proposals for the improvement of the procedure prescribed under Section 1 of the Rules Publication Act have, however, largely become academic, in view of the recent repeal of that section. The Statutory Instruments Act, 1946, which takes the place of the 1893 Act, omits the "ante-natal safeguards"<sup>122</sup> of the earlier statute. It may be going too far to say, as an M.P. did, that "from a constitutional point of view, one of the most surprising changes in the last few months has been the repeal of Section 1 of the Rules Publication Act,"<sup>123</sup> but its repeal is certainly significant to the student of English administrative law. It is true that the value of the machinery provided by that section has often been overrated; true also that much of what was done by Section 1 can be achieved through the informal consultation of interests by the rule-making authority. Yet the operation of the antecedent publicity machinery of that section, imperfect though it was, did constitute an additional check upon delegated legislation, for it elevated the safeguard of consultation to the level of a statutory requirement.

It is of interest to note that statutory provisions for antecedent publicity basically similar to those of Section 1 of the Rules Publication Act were adopted in this country at about the same time that they were repealed in Britain. Section 4 of the Federal Administrative Procedure Act requires general notice of proposed rule making to be published in the Federal Register. Said notice is to include: (1) a statement of the time, place, and nature of the rule-making proceeding; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. The administrative agency must then afford interested persons the opportunity to participate in the rule making through

<sup>122</sup> The term is that of Sir Cecil Carr, *Delegated Legislation* (1921) 34.

<sup>123</sup> Eric Fletcher, *Select Committee on Procedure*, Minutes of Evidence, 291.

submission of written data, views, or arguments, and all relevant matter so presented must be considered by the agency.

This section of the American Act is not honeycombed, as was Section 1 of the Rules Publication Act, with "anomalous exceptions." In general, however, its provisions apply only to "substantive" rule making, the types of rules that are excepted being largely of a "nonsubstantive" character. In addition, it is not to apply "in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest." This is strikingly similar to Section 2 of the Rules Publication Act, but is more flexible, its grounds not being limited to the "urgency or any special reason" of the English statute and there being no implied time limit, and at the same time less susceptible of the abuses which arose under that Act, in the failure to convert "provisional" into nonprovisional rules, because of the express requirement of findings and reasons.

The great advantage of this section of the Administrative Procedure Act, as compared with its English predecessor, lies in its flexibility. The Rules Publication Act required the procedure outlined in Section 1 to be put into operation after regulations had been made in draft and allowed the public to obtain copies of the draft regulations. This both impinged upon the normal reluctance of the Executive to "tip its hand," as it were, in advance of proposed action, and caused some duplication of administrative action, in the original drafting and then in the consideration of representations or suggestions made—under the Rules Publication Act procedure, "if, as a result of protests coming in during the 40 days, the department changed its mind, it would have to start all over again."<sup>124</sup> The American Act, requiring the rule-making authority to state in its general notice "either the terms or substance of the proposed rule or a description of the subjects

<sup>124</sup> Professor Wade, *id.* at 292.



and issues involved," appears to be flexible enough to avoid these difficulties.

An administrative regulation, unlike a statute, may often come into effect without adequate knowledge on the part of those affected. Proposed legislation must go through a highly formal procedure, which is intended to ensure adequate consideration of the issues involved and to preclude hardships caused by surprise to the interests concerned. "Even the least significant statute must be formally introduced as a bill, printed, referred to a committee and reported on, often after hearing, read three times before each House, discussed in committee of the whole, passed by each House, and approved by the Executive . . . Administrative rule-making is in striking contrast. The first knowledge that those affected have of a rule is usually after it has gone into effect. The first opportunity they have to challenge it is usually after it is enforced against them and they can attack it in the courts."<sup>125</sup> This is true even where there is ample provision for antecedent publicity, and seems to be the basis of the oft-criticized decision of Bailhache, J., in *Johnson v. Sargant*.<sup>126</sup> In addition, the rule-making authority may often act in ignorance of important relevant information. "Even a cumulation of all of the procedural safeguards that can be brought together in a rule-making proceeding may be insufficient to bring to the attention of the administrative agency some significant point of which account should be taken."<sup>127</sup>

In accordance with a recommendation of the Attorney General's Committee to that effect, Section 4 (c) of the Administrative Procedure Act provides for deferring the effectiveness of all federal administrative regulations having statutory effect until thirty days after their publication. Emergency situations and the like are taken care of by allowing the agency concerned to shorten

<sup>125</sup> Pound, *Administrative Law* (1942) 66.

<sup>126</sup> [1918] 1 K. B. 101.

<sup>127</sup> Report of the Attorney General's Committee, 114.

or dispense with the statutory requirement "upon good cause found and published with the rule." Such a provision for the deferred effectiveness of administrative regulations is not a novelty on the American statute book. A number of statutes prior to the 1946 Act contained such provisions, the specified time limit varying from thirty to ninety days, and, in addition, different periods have from time to time been specified by administrative agencies themselves.<sup>128</sup> The Administrative Procedure Act, for the first time, makes deferred effectiveness a uniform requirement of administrative rule making.

One of the most significant differences between the provisions of the Administrative Procedure Act that we have been discussing and similar legislation in Britain is the requirement in the former of specific findings by the agency concerned upon the exercise of any power granted to it to dispense with the statutory requirements. The agency may waive neither the antecedent publicity nor the deferred effectiveness provisions except for good cause found, which must be published in the regulations. This is a good deal more than the "certification" required under Section 2 of the English Rules Publication Act, for it opens the door to judicial review of the administrative action. Another requirement along this line is the provision in Section 4 (b) that "the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose." This is intended to serve as a guide to both public and judiciary, much as does the "statutory preamble."

The type of explanatory notes contemplated by this provision was also urged by the British Committee on Ministers' Powers as a desirable practice.<sup>129</sup> The use of such notes was introduced in Britain during the war as a general requirement of Defence Regulations or orders made thereunder, and they have now come to be appended to all Statutory Instruments upon which proceed-

<sup>128</sup> *Id.* at 114-15.

<sup>129</sup> Report, 66.

ings may be taken in the House, though apparently not to all delegated legislation.<sup>130</sup> These notes are prefaced with a statement to the effect that: "This note is not part of the Order, but is intended to indicate its general purport"—"a warning which presumably seeks to avert the risk of legal difficulty arising from repugnancy between text and note."<sup>131</sup>

Such explanatory material can prove of great value in clarifying delegated legislation. Indeed, their express purpose is that of "making it as easy as may be for the Member and the public who are equally concerned with the Member of Parliament, and many trades and industries, to understand what it [*i.e.*, the regulation or order] is getting at."<sup>132</sup> In Britain, explanatory notes serve another useful function: they help relieve the burden upon the Select Committee on Statutory Instruments, for, as explained by Sir Cecil Carr, the use of such notes "very often makes the thing self-explanatory and makes it unnecessary for the scrutinising Committee to go very deeply into the document."<sup>133</sup>

<sup>130</sup> Select Committee on Statutory Rules and Orders, Third Special Report (1946).

<sup>131</sup> *Ibid.*

<sup>132</sup> Herbert Morrison, Select Committee on Procedure, Minutes of Evidence, 151.

<sup>133</sup> *Id.* at 245.

## CHAPTER V

### JUDICIAL CONTROL

Judicial review is one of the important balances of our constitutional system.”<sup>1</sup> The constitutional province of the judiciary in a polity such as ours is to serve as a check upon the Executive branch of government. The historic role of the courts—to act as a brake on excursions by the Executive beyond its lawful area of authority—must, in fact, become even more important, from the point of view of preserving the rule of law, as Executive power increases with the transition to the Public-Service State. The traditional checks on governmental power will no longer be as effective with the acquisition by the State of a monopoly of economic power, which, added to its present monopoly of political power, will make government by far the all-dominant force in society. The great need then will be for some independent body to act as a check against excess of power and abusive exercise of power—the role historically performed by our courts.

Few in the common-law world, at least, would dispute the need for checks on governmental power. However, it is asserted by some that our courts are no longer adequate to carry out this task. The judge, it is said, has his roots in the past, and is ill-fitted both by training and tradition to give adequate scope to the ends of modern government. We can choose as our example of this viewpoint the contentions before the Donoughmore Committee of Dr. W. A. Robson, one of the least extreme exponents

<sup>1</sup> Report of the Attorney General's Committee on Administrative Procedure, 209.

of this view, who would substitute for the ordinary courts as the check upon the Executive a system of administrative courts, similar to those in France and other Continental countries. Discussing the question of appeal to the courts, he suggests that criticisms directed on a priori grounds against the exercise of judicial powers by government departments and the preclusion of judicial review usually fail to take account of, among other things:

"Limitations to the suitability of the Courts to act as tribunals of review for certain types of administrative decisions. These limitations may arise from various causes such as (a) Lack of special knowledge or experience of the subject matter. (b) Absence of a body of case-law appropriate to the circumstances. The result of this is either a mere transfer of discretion from the Executive to a non-expert judicial body unconcerned with functional ends, or a refusal by the Courts to disturb the administrative determination. (c) Existence of a body of hardened legal doctrine, unsuited to the unforeseen circumstances which may now have arisen. (d) Traditional lack of sympathy with the positive aims of modern government. (e) Defects in the procedural machinery and legal forms which must be used in order to obtain access to the Courts. For example, such remedies as *mandamus*, *prohibition*, *certiorari*, and *ultra vires* are in many cases useless for the purpose of getting a review of administrative determinations. (f) Expense and difficulty of litigation. (g) The absence of a body of public law and the concepts appropriate thereto in English jurisprudence. (h) Volume of business which would press upon the Courts and produce congestion."<sup>2</sup>

These points must be gone into somewhat more fully, for, if valid, they tend to destroy the whole basis upon which our inquiry has rested. The first of these, judicial inexpertness, is usually seized upon by those who would oust the courts of all jurisdiction over Executive action; but they surely overstate their

<sup>2</sup> Minutes of Evidence, 52.

case. The role of the expert in modern government is, it is true, a vital one. The need to make use of the specialist has, indeed, been one of the prime reasons for resort to the administrative process. "In many cases a principal reason for establishing an agency has been the need to bring to bear upon particular problems technical or professional skills."<sup>3</sup> The utilization of Executive expertness does not, however, militate against control by the courts. It is a fundamental principle of our polity that the expert should be kept "on tap and not on top"; "the characteristic liberties of England depend on the ancient tradition that the expert and the specialist should serve and not command."<sup>4</sup> In carrying out this principle, the nonexpertness of our courts plays an essential part. It is the great virtue of the judicial process that it employs men who are not specialists in any one field of endeavor but who, instead, by disposition and training, can deal with all types of cases. The limitations of the expert—the inability to see beyond the narrow pigeonholes of his own experience, the intolerance of the layman, and the excessive zeal in carrying out his policy, regardless of the cost to other, broader interests of society—are subjected under our system to the trained scrutiny of the nonexpert judge, who, unhindered by the professional bias of the specialist, is able to take a broader view than that of merely promoting administrative policy in the case at hand, whatever may be the ultimate cost.

Detailed knowledge of the technical subject dealt with is not fundamental to the performance of the judicial role. Much of the ordinary work of our courts involves matters of great complexity, in which the judge concerned would not presume to be considered an expert. The problems arising in the review of an administrative determination are certainly no more complicated than those dealt with, for example, in a difficult admiralty or corporate reorganization case. This is not, of course, to say that

<sup>3</sup> Report of the Attorney General's Committee, 19.

<sup>4</sup> The Times (London), Oct. 30, 1937, p. 15, col. 2.

no play should be given to Executive expertness and that the courts should entirely supplant the administrative process. The role of the judiciary is directed toward the *control* of abuses, not toward converting Executive action into a mere preliminary to court proceedings. So much must be conceded to the argument based upon *expertise*. "We expect judicial review to *check*—not to *supplant*—administrative action. Review must not be so extensive as to destroy the values—expertness, specialization, and the like—which, as we have seen, were sought in the establishment of administrative agencies."<sup>5</sup> But to contend from this that all access to the courts must be barred, that any judicial control is an unwarranted interference with administrative expertness, is to go too far.

The claim that the courts are unsuited to review administrative determinations because of the inadequacy of legal doctrine must likewise be rejected. To one unfamiliar with the technique of judicial decision in the common-law world, it is true, the inadequacy of the pre-existing body of case law to handle the problems caused by the industrial revolution must seem painfully obvious. A jurisprudence based upon feudal notions, precedents based upon "horse-and-buggy" factual situations, must surely appear unsatisfactory for dealing with modern issues. To assume, however, that existing case law and traditional legal doctrine are wholly unsuited for present-day conditions is to lose sight of the part played by what Dean Pound has aptly termed "judicial empiricism"<sup>6</sup> in molding the course of legal development. The technique of proceeding by analogy from authoritative precepts to cope with novel situations—the process of deriving principles inductively from the judicial experience of the past—has enabled our law successfully to make the transition to the present century.

But, it is said, to admit the role of judicial lawmaking is merely to transfer "discretion from the Executive to a non-expert judicial

<sup>5</sup> Report of the Attorney General's Committee, 77.

<sup>6</sup> The Spirit of the Common Law (1921) c. VII.

body unconcerned with functional ends." The discretion of the judicial lawmaker is not, however, an uncontrolled one. "We are not bound to believe that they [the judges] make legal precepts and set up legal institutions out of whole cloth. Except as an act of Omnipotence, creation does not mean the making of something out of nothing. Creative activity takes materials and gives them form so that they may be put to uses for which the materials unformed are not adapted."<sup>7</sup> In other words, the judicial discretion here is a disciplined one, exercised on the basis of reason and not arbitrary will.

This is true even where the judge is presented with a genuine opportunity for choice—where a solution to the novel problem at hand can be reached from two or more logically applicable authoritative starting points. "Even in those cases, the preference is [not] blind or arbitrary. The balance is swayed not by gusts of fancy, but by reason."<sup>8</sup> Was not the reception, for example, of the doctrine of *Rylands v. Fletcher*<sup>9</sup> by certain American courts, where the judicial discretion in accepting or rejecting the doctrine was theoretically an unfettered one, based upon logical reasons, and not the mere caprice of the individual judge?<sup>10</sup>

\* The asserted traditional lack of sympathy on the part of the judiciary with the positive aims of modern government is closely connected with the point just discussed, for the judicial subservience to an obsolete body of rigid legal doctrine is said to be one of the prime causes of this antipathy between the courts and effective government. The type of case usually referred to is that mentioned by Professor Laski during the questioning of Dr. Robson, namely *Rex v. Lyon*,<sup>11</sup> where the court upheld the surcharge by the district auditor of the amount spent by a local

<sup>7</sup> Pound, *Interpretations of Legal History* (1923) 127.

<sup>8</sup> Cardozo, *The Growth of the Law* (1924) 58.

<sup>9</sup> (1868), L. R. 3 H. L. 330.

<sup>10</sup> See Bohlen, "The Rule in *Rylands v. Fletcher*" 59 U. of Pa. L. Rev. 298 (1911).

<sup>11</sup> [1922] 1 K. B. 232.



education authority on special performances of Shakespearean plays for school children. The basis of the decision was that the local authority's power to authorize visits to "places of educational value and interest" under the Education Code did not extend to defraying out of public funds the cost of providing such places. "Although the council are fully entitled to take children to such a place we do not think the words in s. 44 (b) entitle them not only to take the children to the place but to provide the place and provide the actors and actresses who give the performances."<sup>12</sup> Now this holding, it is submitted, does not justify Professor Laski's characterization of the case as one in which the court took the view "that attendance at or performance in plays of Shakespeare is not an educational function."<sup>13</sup>

It is a mistake to assume that law must inevitably lag behind the other social sciences. The opposition between law and government, the subordination of administration to law, which have hindered American legislative experiments during the past century are not inherent in judicial justice. Mr. Justice Cardozo, in an analysis of decisions such as *Ives v. South Buffalo Ry. Co.*<sup>14</sup> and *Adkins v. Children's Hospital*,<sup>15</sup> has shown that the results reached were due to the judicial choice of certain starting points. "A problem in the choice of methods lay back of the problem of law, and determined its solution. On the one hand, the rights of property, as it was known to the fathers of the republic, was posited as permanent and absolute. Impairment was not to be suffered except within narrow limits of history and precedent. No experiment was to be made along new lines of social betterment. The image was a perfect sphere. The least dent or abrasion was a subtraction from its essence. Given such premises, the conclusion is inevitable. The statute becomes an illegitimate assault

<sup>12</sup> *Id.* at 235.

<sup>13</sup> Minutes of Evidence, 57.

<sup>14</sup> 201 N. Y. 271 (1911).

<sup>15</sup> 261 U. S. 525 (1923).

upon rights assured to the individual against the encroachments of society. The method of logic or philosophy is at work in all its plenitude. The opposing view, if it is to be accepted, must be reached through other avenues of approach. The right which the assailants of the statute posit as absolute or permanent is conceived of by supporters of the statute as conditioned by varying circumstances of time and space and environment and degree. The limitations appropriate to one stage of development may be inadequate for another. Not logic alone, but logic supplemented by the social sciences becomes the instrument of advance."<sup>16</sup>

Not an inveterate antipathy between law and government, but the influence of the nineteenth-century individualist ethic upon which the thinking of these judges was based was responsible for which starting point was chosen. Judicial justice is not always too slow in responding to changes in the environment in which it operates. Nor is the growing point of law invariably in legislation. Most fundamental changes in our legal system have indeed been the work of our courts. "The infusion of morals into the law through the development of equity was not an achievement of legislation, it was the work of courts. The absorption of the usages of merchants into the law was not brought about by statutes but by judicial decisions."<sup>17</sup> The development of an American common law—the creation of a body of judicially declared principles suitable to America, out of the old English cases and statutes—was almost wholly of judicial handiwork.<sup>18</sup> Where was the claimed "judicial lag" when the vision of John Marshall was helping to mold a confederation of separate States into a united nation, or when the English courts, under the leadership of Lord Mansfield, were fusing the principles of common law, equity, and law merchant into a modern legal system?

The backwardness of some of our courts with respect to social

<sup>16</sup> *Op. cit. supra* note 8, at 72.

<sup>17</sup> Pound, *The Spirit of the Common Law* (1921) 184.

<sup>18</sup> See Pound, "Justice According to Law" 14 *Col. L. Rev.* 103, 113 (1914).

problems during the past century, which some assert to be inherent in judicial justice, was thus only a temporary phase, based upon the persistence in the judicial mind of a temporary individualist philosophy. The remedy for this deficiency is not to withdraw the problems growing out of present-day government from the sphere of the judicial process. The infusion into the judicial philosophy of modern social and economic ideas is already furnishing new premises to enable our courts to deal constructively with the issues arising from the changing role of the State. "When once the current of juristic thought and judicial decision is turned into the new course our Anglo-American method of judicial empiricism has always proved adequate. Given new premises, our common law has the means of developing them to meet the exigencies of justice and of molding the results into a scientific system."<sup>10</sup>

The absence of a body of public law and the concepts appropriate thereto, which Dr. Robson urges as another factor limiting the suitability of the ordinary courts to review administrative action, if taken literally, is not applicable to Anglo-American jurisprudence today. The field of public law, though not perhaps as prominent in Britain as on this side of the Atlantic, has surely gone a good way since the pioneering work of Dicey. If what is meant here, however, is the lack of public-law concepts such as those obtaining in most Continental countries—in the sense of a body of law distinct from the ordinary private law, proceeding on wholly different principles—then its absence from our jurisprudence is not to be deplored. The notion that the administration of justice must be dualist in character—that different rules are to be applied to State action, that differing consequences are to follow where the acts of government officials are involved, that such cases are to be removed from the cognizance of the ordinary law courts—is wholly foreign to our legal philosophy. We have always rejected, both in our theory and practice, the

<sup>10</sup> Pound, *The Spirit of the Common Law* (1921) 184.

consequences flowing from these ideas: that the official is to be placed on a higher plane than the individual, that immunity must be given to government officials *qua* officials.

It has become the fashion of late strongly to criticize the work of Dicey, but he certainly saw this fundamental point more clearly than most of his critics. With us, he insisted, it must be the law courts that are to determine questions of public law, and the applicable principles are those that have been worked out by analogy from the ordinary private law by the method of judicial empiricism. This, indeed, is implicit in his third meaning of the rule of law: that the British Constitution has been derived from judicial decisions; that it is based upon legal decisions rather than that it is the result of a legislative act. The "law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequences of the rights of individuals, as defined and enforced by the courts; . . . in short, the principles of private law have with us by the action of the courts and Parliament been so extended as to determine the position of the Crown and of its servants."<sup>20</sup> This is the basic principle under which Executive power is controlled in our polity. "Any official who exceeds the authority given him by the law incurs the common law responsibility for his wrongful act; he is amenable to the authority of the ordinary courts, and the ordinary courts have themselves jurisdiction to determine what is the extent of his legal power, and whether the orders under which he has acted were legal and valid."<sup>21</sup>

The absence of public-law concepts, in the Continental sense, rather than being a defect of our jurisprudence is, thus, its great strength. It enables control over Executive action to be maintained through the same institutions that administer the normal law of the land, and on the same basic principles of

<sup>20</sup> Law of the Constitution (9th ed. 1939) 203.

<sup>21</sup> *Id.* at 389.

justice. It prevents the State from placing its own officials in a privileged position by refusing to accept the assertion that different rules are applicable to their action. Indeed, in so far as the common-law courts have not followed this principle consistently, in so far as they have placed State action upon a higher plane of immunity, to that extent has our jurisprudence accepted the Continental theory. Thus, the privileged position of the Crown as litigant in English law was characterized by the Committee on Ministers' Powers as a "lacuna in the rule of law"<sup>22</sup>—a condition that has only recently been remedied through the passage of the Crown Proceedings Act, 1947.<sup>23</sup>

The basic premise upon which we must proceed, then, is that Executive action must be subject to judicial control, exercised according to common-law principles. It would, however, be highly unrealistic not to recognize certain defects of judicial justice, which hamper our courts from playing as effective a role here as they otherwise might. First among these must be reckoned the cost and difficulty of litigation. Though not as formidable in this country as in England—where the old adage that the courts of justice are "open to all, like the Ritz Hotel," is still largely true—here, too, the cost of going to law constitutes a strong deterrent to the average citizen with a grievance. Especially is this true when the other party to the dispute is the State, with well-nigh limitless resources at its disposal. Added to this is the great delay involved in litigation; judicial justice is dispensed ever so slowly, though it may be dispensed exceedingly well. Much of this expense and delay, it must be admitted, is inherent in judicial justice. The advantages of the judicial process—the procedural safeguards, the opportunity adequately to present one's case, the traditional mode of decision by the judge—cannot be secured without some cost. But a good part of these defects, it is submitted, is remediable.

<sup>22</sup> Report, 112.

<sup>23</sup> 10 & 11 Geo. VI, c. 44.

Many of them—the rigid insistence on formal precept, the overreliance on technical rules of pleading, and the constant climbing of the appellate ladder—are survivals from an earlier day, which no longer serve the needs of modern justice. The intricacies of procedure are not an intrinsic part of the legal process. Great steps have been taken, it is true, in the direction of simplification of procedure, but it still remains, on the whole, painfully complex on both sides of the Atlantic. The problem of legal fees—intensified in England by the professional division of labor between counsel and solicitors—is perhaps a more difficult one. Much of the expense here is caused by the tendency—only a natural one in all litigants who are so able—to employ “fashionable counsel,” who command very large fees. But, as Dr. Allen has pointed out, the reliance upon spectacular “silks” is not necessary to successful litigation, for able members of the profession can be obtained “whose fees are not such as to deter any litigant with a substantial case.”<sup>24</sup>

The deficiencies of judicial justice to which we have been referring are, together with the need for expertness, the chief causes for the growth of administrative justice. The inability of the courts to handle the problems arising out of the expansion of governmental authority has made it necessary for them to be dealt with initially elsewhere. This does not, however, militate against the judicial control of these other agencies. Although the courts are unable themselves to cope with the great mass of questions that arise, they can still exercise a most salutary influence through their review function; *i.e.*, the historic role of the judiciary as a check upon Executive absolutism. The asserted inability of the courts to perform even this limited task, because of the “volume of business which would press on the Courts and produce congestion,” simply does not hold water in the light of experience. “Nobody outside Bedlam supposes that the reason why Courts of law exist in a civilized community is that the

<sup>24</sup> Law and Orders (1945) 286.

founders of the State have believed happiness to consist in the greatest possible amount of litigation among the greatest possible number of citizens. The real triumph of Courts of law is when the universal knowledge of their existence, and universal faith in their justice, reduce to a minimum the number of those who are willing so to behave as to expose themselves to their jurisdiction . . . . The knowledge that the machinery exists, and that when it is employed it is employed with skill and without favour, has the effect of rendering its employment unnecessary save only in the exceptional case."<sup>25</sup>

The appeal provisions of the British insurance acts, which we have already touched upon, did not produce the claimed congestion. Nor has the general review power of the American judiciary led to a plethora of cases, with which the courts have been unable to deal. The right of review is rarely resorted to for its own sake. Unless the judicial power here is too broad (as was the tendency, for example, in the early cases of review of the Interstate Commerce Commission), the individual will in most cases not go beyond the administrative decision. It is only during a comparatively short period after the enactment of the enabling legislation that there is a large volume of cases, so that doubtful points in the statute may be cleared up. The clarification of the field by the "trial and error" of judicial decisions leads to a drastic drop in the number of cases. Whatever may be the situation then, with regard to the initial disposition of these matters, it seems clear that our courts can adequately deal with them, as far as review is concerned.

If judicial control is to be of more than theoretical efficacy, there must be a relatively simple and inexpensive means of access to the courts. The relevant procedure must enable the judiciary to afford a sufficiently wide review to check Executive abuses, unhindered by technicalities of pleading and theories of action, which are unsuited to modern conditions. The procedure by

<sup>25</sup> Hewart, *The New Despotism* (1929) 155.

way of prerogative writs, through which nonstatutory review has generally been obtained in England, has often been criticized as inappropriate for present-day needs. The Committee on Ministers' Powers, in its comment upon this, asserted that "procedure by way of *certiorari*, *prohibition*, and *mandamus* is archaic and in some ways cumbrous and inelastic, and we would suggest the expediency of introducing a simpler, cheaper and more expeditious procedure."<sup>26</sup> The Administration of Justice Acts, 1933 and 1938,<sup>27</sup> which sought to give effect to this suggestion, have effected some improvement in procedure here by providing that simple orders of *mandamus*, *prohibition*, and *certiorari* be substituted for what were formerly known as the prerogative writs. This statutory change did not, however, alter the legal effects of what were previously the prerogative writs, and it therefore becomes necessary to go somewhat more fully into their scope and theory of review.

Generally speaking, judicial review in England follows the classification of the Attorney General's Committee on Administrative Procedure into *statutory* and *nonstatutory* methods of review; *i.e.*, those contained in statutes and those developed by the courts in the absence of legislation.<sup>28</sup> Appeals from administrative determinations cannot be taken in the absence of statutory provisions. The rule is aptly put by Swift, J., in *In re Bowman*:<sup>29</sup> "As I said in the course of the argument, an appeal is the creature of statute. Apart from statute there is no right in this country to appeal from one court to another. If a person desires to appeal from one tribunal to another, be the former a judicial tribunal in the ordinary sense of the term, or a tribunal such as the Minister of Health and his department, for purposes such as

<sup>26</sup> Report, 62.

<sup>27</sup> 23 & 24 Geo. V, c. 36, § 5; 1 & 2 Geo. VI, c. 63, § 7.

<sup>28</sup> Report, 80.

<sup>29</sup> [1932] 2 K. B. 621, 633. Cf. *Morris v. Minister of Pensions*, [1948]

1 All E. R. 748; *Racecourse Betting Control Board v. Secretary for Air*, [1944] Ch. 114.



I am considering in this case, he can only do so if a statute has given him the right and only within the limits which the statute giving the right lays down." In the absence of a statute, there is only the general supervisory control of the High Court over inferior bodies, exercised through the prerogative writs which, as we shall see, afford only a limited review

"Following its usual process of growth by analogy, our law has begun with the fact that administrative tribunals are composed of public officers, and has applied to them the rules governing court control of the acts of such officers."<sup>30</sup> This is of more than mere historical interest, for the theory of judicial review is largely based upon this historical fact, and from it flow many of the deficiencies of review of administration. The theory upon which review is placed, though shaped long before the administrative process had become a significant factor in government, is still that upon which we proceed in seeking to control administrative action today. "The theory is that every public officer has marked out for him by law a certain area of 'jurisdiction.' Within the boundaries of this area he can act freely according to his own discretion, and the courts will respect his action as final and not inquire into its rightfulness. But if he oversteps those bounds, then the courts will intervene. In this form, the law of court review of public officers becomes simply a branch of the law of *ultra vires*. The only question before the court is one of jurisdiction, and the court has no control of the officer's exercise of discretion within that jurisdiction."<sup>31</sup> An understanding of this theory is of prime importance to the student of Anglo-American administrative law. Review based upon it must, of necessity, be a very limited one, focused upon the jurisdictional question alone—administrative action within its jurisdiction not being subject to judicial correction.

Direct review of administrative action in England is, in the

<sup>30</sup> Dickinson, *Administrative Justice and the Supremacy of Law* (1927) 39.

<sup>31</sup> *Id.* at 41.

absence of statutory provisions for review, generally obtained through the so-called "extraordinary" or "prerogative" writs of certiorari, mandamus, and prohibition, which have been referred to above. Though originally developed as a means of controlling inferior courts, their use has been expanded, so that they are now the normal method of controlling administrative agencies where there is no statute governing review. This development is well put, with regard to certiorari and prohibition, by Lord Justice Atkin in a leading case:

"It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."<sup>32</sup>

Certiorari and prohibition are the two writs most frequently used to obtain nonstatutory review in the English practice.<sup>33</sup> Both certiorari and prohibition are writs "of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order

<sup>32</sup> *Rex v. Electricity Commissioners*, [1924] 1 K. B. 171, 205.

<sup>33</sup> Under §§ 21 and 40 (5) of the Crown Proceedings Act, 1947, injunctions and orders of mandamus are not obtainable against the Crown or its agents. *Cf.* Wade, "The Courts and the Administrative Process" 63 L. Q. Rev. 164, 170 (1947).

quashed.”<sup>34</sup> Both proceed upon the jurisdictional theory of review, but it is going too far to hold, as many courts have, that review under them extends only to the bare question of jurisdiction. Professor Freund has shown that the error of many American courts on this score was caused by a misunderstanding of the history of certiorari. “The frequency with which the writ was used to remove summary convictions into the Court of King’s Bench led Parliament to insert into many statutes clauses forbidding such removal; but it was held that the statutory prohibition did not apply where the proceeding was vitiated by some defect of jurisdiction (*Q. v. Wood*, 5 El. & Bl. 49). From this arose in America a very widespread misapprehension that the writ would not lie to correct other than jurisdictional errors.”<sup>35</sup>

The incorrectness of this doctrine was clearly pointed out in an opinion by Judge Campbell of the Supreme Court of Michigan in a leading case.<sup>36</sup> “It must be apparent to anyone that if the superior court could only examine into the right of the inferior one to enter upon an inquiry, without reference to the manner in which that inquiry is conducted, this remedy would be of small account.” The usual office of the writ is to inquire into something more than the bare jurisdictional question. True it is, says he, that certiorari does not review questions of fact, but of law. “And in examining into the evidence the appellate court does so not to determine whether the probabilities preponderate one way or the other but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal.” The office of the writ is thus to review all questions of regularity in the proceedings—to correct all errors of law and to review facts,

<sup>34</sup> *Rex v. Electricity Commissioners*, [1924] 1 K. B. at 204.

<sup>35</sup> *Administrative Powers over Persons and Property* (1928) 260.

<sup>36</sup> *Jackson v. People*, 9 Mich. 111, 118-19 (1860).

at least in so far as necessary to find an evidentiary basis for the conclusions of the inferior tribunal.

This statement of the scope of *certiorari* would seem to be the correct one, both from the point of view of historical development and on the practical ground of the proper functions of judicial review. It enables control effectively to be asserted by permitting the courts to check administrative abuses, even though they are committed within the area of jurisdiction, and at the same time permits the legitimate exercise of Executive discretion, for it is not so extensive as to allow review upon the merits.

It must, however, be admitted that the scope of review on *certiorari* in the English cases is narrower than that asserted by Judge Campbell, however much one may approve his language as a statement of the proper practice. The effect of the English cases is summarized in Halsbury's *Laws of England*<sup>37</sup> in a passage which was approved by Greer, L.J., in the Court of Appeal: "Where the proceedings are regular upon their face and the magistrates had jurisdiction, the superior court will not grant the writ of *certiorari* on the ground that the court below has misconceived a point of law. When the court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of evidence, or convicts without evidence."<sup>38</sup>

"Those are all matters of appeal," said Lord Goddard, C.J., in commenting upon this passage. "They are not matters in respect of which *certiorari* will lie, nor are they matters which can be brought before the court on this proceeding merely because the statute gives no right of appeal . . . . We have only to see whether this order is good on the face of it and whether it is an order which it is within the jurisdiction of the tribunal

<sup>37</sup> Vol. 9 (2d ed. 1933) 888.

<sup>38</sup> *Rex v. Minister of Health*, [1939] 1 K. B. 232, 246.

to make.”<sup>39</sup> “Thus, whilst certiorari is the appropriate remedy where ‘judicial’ powers have been exceeded or abused, it will not lie to enable the final determination of the authority entrusted with those powers to be reviewed on its merits, either for insufficiency of evidence or lack of evidence.”<sup>40</sup>

It will be recalled that both certiorari and prohibition “in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice.” And even today the writs are not available against “other than judicial acts.”<sup>41</sup> This requirement has, however, been very liberally construed. Certiorari, said Fletcher Moulton, L.J., in an important case, “is frequently spoken of as being applicable only to ‘judicial acts’, but the cases by which this limitation is supposed to be established shew that the phrase ‘judicial act’ must be taken in a very wide sense, including many acts that would not ordinarily be termed ‘judicial.’”<sup>42</sup> As further explained by Scrutton, L.J.: “It is not necessary that [the body reviewed] should be a Court in the sense that this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari.”<sup>43</sup> The passage of Atkin, L.J., in the leading case of *Rex v. Electricity Commissioners*, which has been quoted above, is a further indication of the liberal judicial attitude here, so that the writs will today lie to review practically all administrative determinations. This is true even where the action reviewed is legislative in character,

<sup>39</sup> *Rex v. Furnished Houses Rent Tribunal*, [1947] 1 All E. R. 448, 449. See *Rex v. Nat. Bell Liquors, Ltd.*, [1922] 2 A. C. 128, 151.

<sup>40</sup> De Smith, “The Limits of Judicial Review: Statutory Discretions and the Doctrine of Ultra Vires” 11 Mod. L. Rev. 306, 307 (1948). See *Rex v. Ludlow; ex parte Barnsley Corp.*, [1947] K. B. 634.

<sup>41</sup> *Rex v. Woodhouse*, [1906] 2 K. B. 501, 512.

<sup>42</sup> *Id.* at 534.

<sup>43</sup> *Rex v. The London County Council*, [1931] 2 K. B. 215, 233.

if there is a duty upon the Executive to exercise the power conferred in a judicial manner. Thus, as we shall see, some of the leading cases in the field have concerned the confirmation of housing schemes by the Minister of Health—an exercise by the Minister of powers of delegated legislation.

But, although the requirement that the action reviewed must be judicial in character has been broadly construed, there still must be a residuum of judicial power before certiorari and prohibition can issue. They are not available to review purely legislative acts, where the judicial element is totally absent. They cannot be used, for example, to question the validity of Executive regulations, where the authority delegated is wholly legislative in character. It will at once be asked why the exercise of such powers should be open to judicial question at all. Is not the Executive here performing a function which is directly analogous to that normally discharged by the legislature, and should it not, therefore, be placed in the same position of immunity as Parliament itself? However, it is not enough to say that, because the exercise of such power by the legislature is not subject to judicial control, like exemption should be granted to the Executive. A basically similar contention was disposed of by Mr. Justice McReynolds in *Southern Railway Co. v. Virginia*:<sup>44</sup>

"Counsel submit that the legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative

<sup>44</sup> 290 U. S. 190, 197 (1933).

determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

In addition, it must be kept in mind that delegated legislation is essentially subordinate in character. "The power to legislate, when delegated by Parliament, differs from Parliament's own power to legislate. Parliament is supreme and its power to legislate is therefore unlimited . . . . But any power delegated by Parliament is necessarily a subordinate power, because it is limited by the terms of the enactment whereby it is delegated."<sup>45</sup> Under our constitutional system, it is for the courts to say whether the exercise of the power of delegated legislation was within the limits of the legislative grant.

The possible gap here left by the limitations upon the availability of the prerogative writs can be readily filled in through the use of the declaratory-judgment procedure to challenge the legality of an Executive rule or order. The development of the declaration in actions to place in issue the validity of administrative action has been a matter of slow growth. Yet the advantages of such procedure in the field of administrative law seem almost self-evident. "It is not merely its speed, inexpensiveness, and simplicity which commend the declaration of rights in administrative law, nor yet the facts that it enables disputes to be determined in their incipiency before they have grown into devastating battles and that a decision is obtainable without the prior necessity of a purported violation of law or precarious leap in the dark. It is rather the fact (1) that administrative officials in the performance of their duties or in challenges to the validity of their acts require no coercive remedies or sanctions, but merely a declaration of their legal relations, in order to remain, or be kept, within the bounds of legality; and (2) that the procedural vehicles by which administrative acts are submitted to judicial

<sup>45</sup> Report of the Committee on Ministers' Powers, 20.

review, namely, the extraordinary legal remedies and injunctions, have accumulated so vast a cargo of technicalities that the citizen desirous of challenging an administrative power or privilege finds himself frequently engulfed in a procedural bog which bars him from his goal.”<sup>46</sup>

The use of the declaratory judgment to inquire into the *vires* of an administrative regulation has been established in England ever since the leading case of *Dyson v. Attorney-General*.<sup>47</sup> The Court of Appeal in that case sustained the propriety of the declaration procedure to determine the validity of a certain income-tax form, over the protests of the Attorney-General that the “plaintiff has no right to ask for a declaration that he is not under any obligation to comply with this notice. The plaintiff may have a good defence if the Attorney-General proceeds by information to recover the penalty, but he has no right to bring an action of this kind; it is turning the procedure upside down.”<sup>48</sup>

This contention was answered by Lord Justice Farwell in very strong language. “It would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty.”<sup>49</sup> Or, as stated by Fletcher Moulton, L.J., in the subsequent substantive action in the case: “It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty. There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no

<sup>46</sup> Borchard, *Declaratory Judgments* (2d ed. 1941) xv.

<sup>47</sup> [1911] 1 K. B. 410.

<sup>48</sup> *Id.* at 413.

<sup>49</sup> *Id.* at 421.



more convenient mode of doing so than by such an action as this."<sup>50</sup>

<sup>50</sup> [1912] 1 Ch. 158, 168. For cases applying the rule in the *Dyson* case, see *Attorney-General v. Foran*, [1916] 2 A. C. 128; *China Mutual Navigation Co. v. Maclay*, [1918] 1 K. B. 33; *Grant v. Knaresborough Urban District Council*, [1928] Ch. 310; *Burghes v. Attorney-General*, [1911] 2 Ch. 139. But see *Bombay and Persia Steam Navigation Co. v. Maclay*, [1920] 3 K. B. 402.

## CHAPTER VI

### I. ULTRA VIRES

The law of judicial review of Executive action has, as we have seen, been largely developed as a branch of the law of *ultra vires*. In Britain, review is still focused almost entirely upon the question of *vires*—the court's power being limited to checking excesses of jurisdiction on the part of the Executive. If liberally interpreted, the judicial authority here is not limited to the question of jurisdiction, for it extends to the correction of administrative abuses committed within the area of jurisdiction. It is suggested that the doctrine of *ultra vires* can, indeed, be interpreted so as to furnish as broad a review, apart from constitutional questions, as is granted in this country. Thus, procedural matters may be gone into by the reviewing court, for conformity to the principles of "natural justice" is essential to the proper exercise of jurisdiction. Likewise, a decision rendered without any evidentiary basis cannot be said to be within the power conferred. It must be emphasized that it is the courts in Britain, no less than in this country, that are the ultimate judges of the extent of their authority upon review. Any limitations upon the reviewing power of the courts must, in the absence of express legislative prescriptions, of necessity be self-imposed.

The power to restrict Executive action to the confines of the authority delegated is, under our polity, inherent in the judicial power. As expressed by the Supreme Court, in language applicable as well to the other side of the Atlantic: "When Congress passes an Act empowering administrative agencies to carry on

governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."<sup>1</sup>

The importance of such judicial control can, perhaps, best be illustrated by an extreme case, involving the loss of personal liberty due to the arbitrary action of a British colonial governor, on a scale impossible at present in either England or America. The act of annexation of certain African territories provided that they "shall be subject to such laws, statutes, and ordinances" as "the Governor shall from time to time declare to be in force in such territories." Purporting to act under this authority, the Governor issued a proclamation, which set aside the established law of the territories with respect to arrest, trial, conviction, and punishment, and condemned the respondent, a native chief, untried and unheard to imprisonment, the place and duration of his captivity being left to the uncontrolled will of the Governor. The Privy Council, in strong language, ordered the respondent's release. "Their Lordships think it sufficient for the disposal of the appeal," said Lord Watson, "to point out that the proclamation . . . exceeds any delegated authority which was possessed by the Governor in two particulars which constitute its leading features. It is a new and exceptional piece of legislation, differing entirely in character from any of the laws, statutes, and ordinances which he is authorised to proclaim; and it in substance repeals the whole provisions of the existing law, with respect to criminal proceedings, in so far as the respondent is concerned. Upon

<sup>1</sup> *Stark v. Wickard*, 321 U. S. 288, 309 (1944).

these grounds, their Lordships are of opinion that the issue of the proclamation was an illegal and unwarrantable act."<sup>2</sup>

In the words of Lord Shaw, in a later case: "The entire case<sup>as</sup> reported is an instructive example of the manner in which the defence of ordinary and constitutional legal rights of a British citizen ought to be supported by Courts of law even in times of stress as against the pretensions of authority when vested merely with the authority of general words of power."<sup>3</sup>

The need for judicial control does not, however, exist only in such extreme cases where personal liberty is involved. There is danger of arbitrariness in all exercises of power, and only through constant control can illegality be minimized. The good faith of the Executive—the administrative desire, in fact, to conform to the legislative mandate—is irrelevant in this connection. Legal rules, unlike those in the physical sciences, do not have fixed areas of strains and stresses. There is a tendency to stretch legal rules to the breaking point permitted by expediency—to carry out the desired action even at the risk of illegality. "You cannot blame the Minister for trying it on," said a departmental inspector to counsel at a public local inquiry<sup>4</sup>—a remark which, though undoubtedly spoken half in jest, shows the danger in uncontrolled exercises of power.

The *Pyrogallie Acid Case*, which has already been discussed,<sup>5</sup> is a good illustration of the need for judicial control. Another English case which is often cited in this connection is *Rex v. Minister of Health; ex parte Dore*.<sup>6</sup> Under the English system of local government, there is a district audit once a year, and the auditor, if he is of the opinion that certain expenditure is illegal, may surcharge the councilors with the amount. The *Dore* case arose out of such a surcharge of the councilors of the Borough

<sup>2</sup> *Sprigg v. Sigcau*, [1897] A. C. 238, 248.

<sup>3</sup> *Rex v. Halliday*, [1917] A. C. 260, 300.

<sup>4</sup> Quoted by H. A. Hill, *Minutes of Evidence*, 75.

<sup>5</sup> *Supra* p. 56.

<sup>6</sup> [1927] 1 K. B. 765.

of Poplar, because the Borough Council had been paying its employees a minimum wage, irrespective of service and irrespective of sex. Under the relevant statute, any person aggrieved by a surcharge was authorized to apply to the King's Bench Division for a writ of certiorari to quash the auditor's order, or in lieu of making application to the court for such a writ to appeal to the Minister of Health, who could remit the surcharge on equitable grounds, even though the auditor's order was legally correct.<sup>7</sup> The Poplar councilors elected to go to the courts, and the matter was disputed as far as the House of Lords, where the surcharge was upheld.<sup>8</sup> Having applied unsuccessfully to the courts, the surcharged councilors then appealed to the Minister, and he purported to remit the surcharge. And this in spite of the seemingly clear language of the statute. "You would have thought that if anyone had been advising the Minister, anyone with any legal qualifications at all, those words 'in lieu' would at once have suggested to them that it did not mean 'in addition to.'"<sup>9</sup> The result was that a certiorari of the High Court was necessary to quash the Minister's action on the grounds of its manifest illegality.<sup>10</sup>

Although the need for review on the question of *vires* is thus clear, the reviewing power of the courts must be a limited one. Questions of policy and the exercise of discretion—unless the Executive action is so unreasonable as to constitute an abuse of authority—are beyond the judicial cognizance. As stated by Lord Herschell, L.C., with regard to review by the House of Lords of a certain administrative scheme: "It is entirely beyond the scope of their [*i.e.*, the House of Lords'] duty to consider the policy of the scheme, and they have no power to determine that any modifications should be made in it, unless it is established

<sup>7</sup> Poor Law Amendment Act, 1844, 7 & 8 Vict., c. 101, §§ 35, 36; Ministry of Health Act, 1919, 9 & 10 Geo. V, c. 21, § 3.

<sup>8</sup> *Roberts v. Hopwood*, [1925] A. C. 578.

<sup>9</sup> H. A. Hill, Minutes of Evidence, 71.

<sup>10</sup> *Cf. West Midlands Joint Electricity Co. v. Pitt*, [1932] 2 K. B. 1.

to their satisfaction that the scheme is one which was not within the legal powers of its framers."<sup>11</sup>

However, it is not entirely accurate to say that the courts are never concerned with the administrative policy. It may happen that the Executive, although acting within its jurisdiction, is giving effect to policies beyond or even at variance with the general policy of the law of the land. One of the limitations of administrative expertness is a tendency to see no further than its immediate goal and to carry out its policy even at the risk of impinging upon other and more important social policies. Control by the courts is of vital importance here in assessing the relative interests involved, and in assuring that the policy which is more important to society as a whole will be given effect.

The leading American case on this point is *Southern Steamship Co. v. National Labor Relations Board*.<sup>12</sup> The National Labor Relations Board had ordered the reinstatement of certain seamen who had struck while on board petitioner's ship, although such a strike was in violation of the federal law dealing with revolt or mutiny on shipboard, and punishable penally. The Board contended that, even if the strike did violate the mutiny statute, its reinstatement order was nevertheless valid, for Section 10 (c) of the National Labor Relations Act<sup>13</sup> permits the Board to require an employer who has committed an unfair labor practice, such as the petitioner had admittedly done, to take "such affirmative action, including reinstatement of employees . . . as will effectuate the policies of the Act." The Board could not, however, carry out the policy embodied in the Labor Act in disregard of other, more important legislative ends, such as those in the maritime law. "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it

<sup>11</sup> *In re* the Endowed Schools Act, 1869, [1894] A. C. 252, 255.

<sup>12</sup> 316 U. S. 31 (1942).

<sup>13</sup> 49 Stat. 449 (1935).

may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."<sup>14</sup> The Court consequently held that the Board's action was *ultra vires*. "We cannot ignore the fact that the strike was unlawful from its very inception. It directly contravened the policy of Congress as expressed in §§ 292 and 293 and it was more than a 'technical' violation of those provisions. Consequently, and despite the initial unfair labor practice which caused the strike, we hold that the reinstatement provisions of the order exceeded the Board's authority to make such requirements 'as will effectuate the policies of the Act.'"<sup>15</sup>

The application of this principle in Britain is well shown by the House of Lords' decision in *R. and W. Paul, Ltd., v. Wheat Commission*.<sup>16</sup> By Section 5, subsection 1, of the Wheat Act, 1932,<sup>17</sup> the Wheat Commission, a statutory body set up under the Act to regulate the industry, was empowered to make bylaws for giving effect to the provisions of the Act. By subsection 2: "Without prejudice to the generality of the power conferred by" subsection 1, "by-laws made under this section shall in particular provide— . . . (m) for the final determination by arbitration of disputes arising as to such matters as may be specified in the by-laws." Purporting to act under this section, the Commission made a bylaw, which provided that: "Any dispute arising between the Wheat Commission and any other person as to whether any substance is flour . . . shall be referred to arbitration," as therein provided, "and the decision of the referee as to the matter in dispute shall be final and conclusive." The bylaw then

<sup>14</sup> 316 U. S. at 47.

<sup>15</sup> *Id.* at 48.

<sup>16</sup> [1937] A. C. 139.

<sup>17</sup> 22 & 23 Geo. V, c. 24.

went on to provide that the Arbitration Act, 1889<sup>18</sup> (which, among other things, confers the right of obtaining the judgment of a law court on any point of law arising during the arbitration), should not apply.

The House of Lords held that this bylaw was *ultra vires* of the Wheat Commission, for the administrative action here was at variance with the general legislative policy of leaving open resort to the courts, as expressed in the 1889 Act. "The cardinal vice of the by-law," said Lord Macmillan, "is to be found in its exclusion of the application of the Arbitration Act, 1889, with the consequent deprivation of the rights which that Act confers and in particular the right of obtaining the judgment of the Court on any point of law arising . . . . I find first that there are no express words in the Act ousting the jurisdiction of the Court, but only a power to make by-laws for the final determination by arbitration of disputes arising as to such matters as may be specified in the by-laws. I next find that the by-law in question not only specifies as a matter to be determined by arbitration 'any dispute . . . as to whether any substance is flour', but goes on to provide that to such arbitration the Arbitration Act, 1889, shall not apply. The Arbitration Act is a statute of general application and it confers a valuable and important right of resort to the Courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute provides for the reference of disputes to arbitration it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitrations, with all the attendant rights which the general law confers. I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of

<sup>18</sup> 52 & 53 Vict., c. 49.



arbitrations. Rather the contrary. If this is intended, express words to that effect are in my opinion essential, and there are here no such express words. I am accordingly of the opinion that the Wheat Commission exceeded their powers when they made a by-law that every dispute as to whether any substance is flour should be determined by an arbitration to which the Arbitration Act should not apply."<sup>19</sup>

The doctrine of *ultra vires*, as has been indicated, is the means which the courts in Britain use in checking abuses of power by the Executive. As far as the exercise of powers that are judicial in nature are concerned, a liberal view of the doctrine can enable the scope of review to be interpreted, apart from constitutional requirements, as it is in this country—the conformity to procedural essentials and the requirement that the decision have an evidentiary basis being implicit in the proper exercises of jurisdiction. With regard to the exercise of sublegislative powers, however, the doctrine of *ultra vires* can furnish no such broad scope of review. The reviewing court, in such cases, is concerned not with the Executive regulation-making procedure (except where specific procedural requirements, such as the consultation of advisory committees, are imposed by the enabling act), nor with the basis upon which the Executive acted, but only with the question of whether or not the Executive sublegislation was within the power conferred by statute. "The rules of natural justice do not govern the exercise of legislative powers. The only test to be applied is whether or not they are *intra vires*."<sup>20</sup>

This, in general, is also the rule with regard to the judicial review of regulations in this country.<sup>21</sup> However, there is one

<sup>19</sup> [1937] A. C. at 153-54. Cf. *Rex v. Marylebone County Court Judge*, [1906] 2 K. B. 426.

<sup>20</sup> Wade and Phillips, *Constitutional Law* (3d ed. 1946) 253, n.4.

<sup>21</sup> Except where regulations are required by statute to be made on the record after opportunity for an agency hearing—e.g., under the Fair Labor Standards Act, 52 Stat. 1060 (1938)—in which case the scope of review is similar to that afforded upon review of administrative adjudications.

very important difference. With us, the judicial power to pass upon the *vires* of administrative sublegislation carries with it the power to pass upon its reasonableness. It is for the courts to say whether or not there is a rational relationship between a regulation and the governing statute.<sup>22</sup> "Such rules and regulations must be reasonably appropriate and calculated to carry out the legislative purpose, and must be entirely within the power conferred upon such agency."<sup>23</sup> And in judging of such reasonableness the courts may look not merely to the ostensible wording of the regulation, but to its actual effect in practice. This is illustrated by *Yick Wo v. Hopkins*,<sup>24</sup> where the Court invalidated a California municipal licensing ordinance, which, although fair on its face, was in fact applied in an unreasonable and arbitrary manner so as to discriminate against those of the Asiatic race. "In the present cases," the judgment reads, "we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a class of particular persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an

<sup>22</sup> *Pacific States Box and Basket Co. v. White*, 296 U. S. 175 (1935).

<sup>23</sup> *Wallace v. Feehan*, 206 Ind. 522, 533 (1934).

<sup>24</sup> 118 U. S. 356 (1886).

unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."<sup>25</sup>

The *Yick Wo v. Hopkins* type of case cannot come up in Britain, even apart from the constitutional issue involved, for the courts there do not have the power to pass upon the reasonableness of administrative regulations. This is to be compared with their authority over the sublegislation of local authorities; "unlike other delegated legislation by-laws made by subordinate bodies may be declared invalid not only because they are *ultra vires*, but also because they are unreasonable."<sup>26</sup> The courts will not, however, invalidate such local bylaws unless they are "manifestly oppressive."<sup>27</sup> In *Kruse v. Johnson*,<sup>28</sup> Lord Russell of Killowen, C.J., asserted that such bylaws should be "benevolently" interpreted, saying that "courts of justice ought to be slow to condemn any by-law . . . on the ground of supposed unreasonableness . . . . A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."<sup>29</sup>

This language was quoted with approval in *Sparks v. Edward Ash, Ltd.*,<sup>30</sup> a case dealing with the validity of two traffic regulations made by the Minister of Transport, by Lord Justice Scott, who went on to say: "If it is the duty of the courts to recognize and trust the discretion of local authorities, much more must it be so in the case of a minister directly responsible to Parliament and entrusted by the constitution with the function of administer-

<sup>25</sup> *Id.* at 373.

<sup>26</sup> Wade and Phillips, *op. cit. supra* note 20, at 277.

<sup>27</sup> *Id.* at 278.

<sup>28</sup> [1898] 2 Q. B. 91.

<sup>29</sup> *Id.* at 100. See *Associated Provincial Picture Houses v. Wednesbury Corp.*, [1948] 1 K. B. 223, 228, for a recent statement of this principle.

<sup>30</sup> [1943] K. B. 223, 229.

ing the department to which the relevant field of national activity is remitted." The court in this case thus had "no power to declare these two regulations invalid for unreasonableness, certainly not on any ground submitted in argument before us."<sup>31</sup>

It would seem from the mere discussion of the problem that the learned judge believed that the judicial power here extended to the question of reasonableness; or, in other words, that ministerial regulations could be invalidated on the same grounds as a bylaw made by a subordinate body. Such a doctrine, however, which approaches that held by the American courts, goes too far, at least in such measure as it seeks to state the English law at present. "In so far . . . as it is implied that departmental regulations might be held invalid as being oppressive or unreasonable, though *intra vires*, the passages in question do not represent the law."<sup>32</sup> Yet one may sympathize with the judicial desire to extend the scope of review under the *ultra vires* doctrine, especially in the light of certain developments that have been noted in our discussion of delegated legislation. The tendency to delegate powers in such broad terms that it is almost impossible to know what limits Parliament did intend to impose makes judicial control limited to the bare question of *vires* illusory. The authority delegated is so wide, in fact, as to cover practically all Executive action. Language such as that in the *Sparks* case indicates the judicial desire to extend the scope of review here so that supervision by the courts can be of some efficacy even in these cases. One might, indeed, venture to assert that extension of the *ultra vires* doctrine to include the question of reasonableness is essential to the maintenance of effective judicial control in an age of expanding Executive power. This is all the more important in Britain because of the lack of constitutional principles upon which the courts can seize to assert their control. Complaint of *ultra vires* is "the keystone of the whole system of

<sup>31</sup> *Id.* at 230.

<sup>32</sup> Wade and Phillips, *op. cit. supra* note 20, at 278, n.1.

judicial control"<sup>33</sup> there, and extensions in the scope of review must be brought within that doctrine. Although it seems clear, therefore, that the implications of Lord Justice Scott's language in the *Sparks* case go too far under existing law, one may hope that it foreshadows a future trend in the direction of wider review.

The early development of review in Britain was very different from what it was in this country, owing no doubt to the dissimilar constitutional position of the judiciary. The English courts were, not unnaturally, disposed to adopt a "hands-off" policy when called upon to control administrative power, tending to assimilate the position of these Parliamentary creatures to that of the supreme legislature itself. Then, too, the judicial attitude was affected by an overdeference to Executive expertness. This is well shown by the plaintive plea of Lord Campbell, the then Lord Chief Justice, against committing the enforcement of the Railway and Canal Traffic Act, 1854, to the judicial process. The bill, said he, when it reached the committee stage in the House of Lords, sought to turn the judges into railway directors. In order to be able to discharge their new functions, "they must go as apprentices to civil engineers, and travel upon the railways, in order to acquire some knowledge of engineering, and of the manner in which these railways were conducted." The ordinary courts were incompetent to decide upon these matters. "They should have a lay tribunal for the decision of questions of the nature contemplated by the Bill and not one composed of the judges."<sup>34</sup>

This attitude of the English courts can be illustrated by their initial reception of statutes that purported to place Executive action beyond judicial control. Of these, the most notable have been those wherein Parliament has provided that the Minister may make an order under the act, and that the order when made "shall have effect as if enacted in this Act." The first important

<sup>33</sup> Allen, *Law and Orders* (1945) 134.

<sup>34</sup> Quoted in Robson, *Justice and Administrative Law* (2d ed. 1947) 450-51.

case dealing with the significance of such a provision—*Institute of Patent Agents v. Lockwood*<sup>85</sup>—was decided by the House of Lords in 1894.

By the Patent, Designs, and Trade Marks Act, 1888,<sup>86</sup> Section 1 (1), "a person shall not be entitled to describe himself as a patent agent . . . unless he is registered as a patent agent in pursuance of this Act." By subsection 2, "the Board of Trade shall . . . make such general rules as are in the opinion of the Board required for giving effect to this section," and such rules were to "be of the same effect as if they were contained in this Act." The Board of Trade, in its rules made for giving effect to the statutory authorization, required registered patent agents to pay certain annual fees, on pain of erasure from the register. The defendant in the instant case refused to pay these fees, asserting that the rule was *ultra vires*, as the Act gave no express power to impose fees. The Institute of Patent Agents then brought an action for a declaration that the defendant was not authorized to practice as a patent agent and for an injunction to restrain him from so describing himself.

The House of Lords, on appeal from a judgment holding that the rule in question was *ultra vires*, affirmed the judgment below, but solely on the ground that the Institute had misconceived its remedy, the proper redress being by way of prosecution for violation of the Act. What followed with regard to the *vires* of the rule was, therefore, purely by way of *obiter*. "*Obiter dicta* in the House of Lords, however, have a 'persuasive' force almost equivalent to binding authority,"<sup>87</sup> and the observations on the broader question of *vires* have consequently been as important as though the case had actually turned upon that point.

In the first place, said Lord Herschell, L.C., the rule in issue was clearly *intra vires*, for the prescription of fees was a necessary

<sup>85</sup> [1894] A. C. 347.

<sup>86</sup> 51 & 52 Vict., c. 50.

<sup>87</sup> Allen, *op. cit. supra* note 33, at 139.

element in the execution of the statutory scheme. Parliament, having made no monetary grant for the purpose, must have intended the Board to have the power to raise the necessary funds. "I cannot but think that it was well within the scope of this enactment that the legislature should entrust the Board of Trade, who were to make these rules, with the power of fixing such fees as they thought reasonable and necessary for carrying into effect the purposes of the section."<sup>38</sup>

In this, all their lordships agreed, but Lord Herschell went further and laid it down, gratuitously as it were, that it was not open to the courts to consider the *vires* of the rules. The provision that the rules were to have "effect as if they were contained in this Act" placed them beyond the judicial competence. "My Lords," said the Lord Chancellor in considering the effect of this clause, "I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts . . . I own I feel very great difficulty in giving to this provision that they 'shall be of the same effect as if contained in this Act,' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act."<sup>39</sup> Or, as expressed by Lord Watson, "such rules are to be as effectual as if they were part of the statute itself."<sup>40</sup>

*Lockwood's* case is referred to as "the high water mark of the inviolability of a confirmed order"<sup>41</sup> in a later case, and it is worth while to go somewhat into its background and effect. Sir William Graham-Harrison has shown that the type of clause considered in that case is at least as old as the Statute of the Staple

<sup>38</sup> [1894] A. C. at 356.

<sup>39</sup> *Id.* at 359-60.

<sup>40</sup> *Id.* at 365. Cf. the observations of Bowen, L.J., in *Ex parte Foreman* (1887), 18 Q. B. D. 393, 401.

<sup>41</sup> *Minister of Health v. Rex; ex parte Yaffe*, [1931] A. C. 494, 502, per Viscount Dunedin.

of the fourteenth century, which provided that ordinances made under it were to have the virtue and force of a Parliamentary enactment. "Lord Herschell was indeed very wide of the mark when he said that these words are 'to be found in legislation only in comparatively recent years.'" <sup>42</sup> Such clauses came to be used with increasing frequency until, by the latter part of the nineteenth century, they were quite common in enactments. In the opinion of a leading British administrator, such provisions were included in a good many statutes as a matter of form.<sup>43</sup> The frequency of their use, however, made the language used in *Lockwood's* case of great practical importance from the point of view of judicial control of Executive action.

Lord Herschell's doctrine in the *Lockwood* case has the vice of removing much of Executive action from the judicial competence. It is clear that, under the British constitutional system, Parliament can place delegated legislation beyond any judicial control. But the policy of the common law in favor of access to the courts is a very strong one, and only the clearest expression of the Parliamentary intent should have that effect. Provisions such as that in the *Lockwood* case, which can be interpreted either way, are surely not strong enough to bar the normal right of review.

What the *Lockwood* doctrine means in practice is well illustrated by the following extracts from the argument in *Yaffe's* case, dealing with a similar clause, in which the whole matter was reconsidered by the English courts:

"Will you tell me, if you can, how far you go?", asked Lord Justice Scrutton of the Attorney General during the appeal. What if none of the preliminary requirements specified by the Act have been observed by the Minister. Would his order still be unassailable?

"*Attorney-General*: Yes, my Lord, in my submission . . . .

<sup>42</sup> Minutes of Evidence, 33.

<sup>43</sup> Sir Maurice L. Gwyer, *id.* at 4.



"Lord Justice Scrutton: Unassailable in the Courts no matter how *ultra vires*?"

"Attorney-General: Quite.

"Lord Justice Scrutton: You go the whole domestic animal?"

"Attorney-General: Yes, because if you are *ultra vires* at all, if you step one inch over the boundary, you might as well step a yard over, and in my submission the effect of this clause . . . is to deal with the very case in which the Minister does step over the boundary."<sup>44</sup>

Or, as graphically put during the argument in the Divisional Court:

"Mr. Justice Talbot: Suppose Parliament had intended to say what the Attorney-General says they have said, how could they have expressed it better than they have done?"

"The Lord Chief Justice: They might have said, 'After the passing of this Act, the Minister may do what he likes.'

"Mr. Justice Swift: That is what they *have* said!"<sup>45</sup>

Once the full implications of the *Lockwood* doctrine were realized, attempts were made by the courts to get away from its effects, until finally it was all but repudiated by the House which had laid it down. The first judicial efforts were directed toward circumventing the consequences of the doctrine, wherever possible. Direct attack upon it had to wait, for it was generally believed that whether "rightly or wrongly decided, what it lays down is the law of the land, which can only be altered by an Act of Parliament."<sup>46</sup>

In *Rex v. Electricity Commissioners*,<sup>47</sup> the court was called upon to prevent the further Executive consideration of an *ultra vires* scheme. The Electricity Commissioners, a body established by Section 1 of the Electricity Supply Act, 1919,<sup>48</sup> were empowered to constitute electricity districts and in certain events

<sup>44</sup> Quoted by H. A. Hill, *id.* at 92.

<sup>45</sup> Quoted in Allen, *op. cit. supra* note 33, at 271.

<sup>46</sup> Sir William Graham-Harrison, Minutes of Evidence, 37.

<sup>47</sup> [1924] 1 K. B. 171.

<sup>48</sup> 9 & 10 Geo. V, c. 100.

to formulate schemes for effecting improvements in the existing organization for the supply of electricity in any district so constituted. A scheme so formulated could provide for the incorporation of a joint electricity authority representative of authorized undertakers within the district. By Section 7, the Commissioners could make an order giving effect to a scheme embodying the decisions they had arrived at after a local inquiry, and present the order for confirmation by the Minister of Transport. The order after confirmation was to be laid before each House of Parliament and was not to come into operation until approved by a resolution passed by each House, "and when so approved shall have effect as if enacted in this Act."

The Commissioners constituted an electricity district and formulated a scheme providing for the incorporation of a joint electricity authority in the district so constituted. It provided that the joint authority should appoint two committees to whom were to be delegated certain defined powers and duties. The Commissioners then began to hold a local inquiry with a view toward making an order embodying the scheme. Certain companies affected by the scheme applied for writs of prohibition and certiorari on the ground that the scheme was *ultra vires* in so far as it compelled the joint authority to appoint the two committees and to delegate to them its powers and duties.

The Court of Appeal, holding the scheme to be invalid, granted a writ of prohibition to restrain the Electricity Commissioners from proceeding with its further consideration. The contention for the Crown, that the inclusion in the statute of the *Lockwood* type of clause had the effect of barring judicial intervention at any point—even where, as here, confirmation by the Minister and Parliament was required before the clause could operate—was rejected by the court. "The effect of accepting the argument of the Attorney-General on this point would be very far reaching. It would amount to a decision that the subject has no longer the right in cases like the present, where this form of legislation is

adopted, to come to a Court of law and demand an inquiry whether the action, or decision, of which he is complaining is *ultra vires*. I question very much whether Parliament had any deliberate intention of producing this result by adopting this particular form of legislation.”<sup>49</sup>

The assertion that, if the court were to issue the writ in the present case, it would be trespassing upon ground reserved by Parliament to itself is similarly rejected. “I cannot see why the action of the Court should be so regarded,” said Bankes, L.J. “By the Act of 1919 Parliament laid down the limits of the jurisdiction of the Electricity Commissioners. It did so presumably because it considered that those limits were the proper ones, and the ones which the Commissioners should observe. Why should Parliament object to a Court of law, if appealed to, using its powers to keep the Commissioners within those limits?”<sup>50</sup> The difficulty which the case might otherwise cause to one unfamiliar with the British system, as constituting a judicial interference with a Parliamentary function, is removed upon the realization that the Parliamentary action here was to be by means of affirmative resolution, and not by formal act. Given its full effect, the Crown’s contention “means that the checks and safeguards which have been imposed by Act of Parliament, including the freedom from compulsory taking, can be removed, and new and onerous and inconsistent obligations imposed without an Act of Parliament, and by simple resolution of both Houses of Parliament.”<sup>51</sup>

The procedure for the promulgation of improvement schemes under the 1925 Housing Act<sup>52</sup> was, except for the requirement

<sup>49</sup> [1924] 1 K. B. at 191.

<sup>50</sup> *Id.* at 192.

<sup>51</sup> *Id.* at 207. See *Rex v. Electricity Commissioners; ex parte South Wales Electric Power Co.*, [1941] 2 K. B. 256; *Rex v. Minister of Health; ex parte Villiers*, [1936] 2 K. B. 29; *Rex v. Hendon Rural District Council*, [1933] 2 K. B. 696.

<sup>52</sup> 15 & 16 Geo. V, c. 14.

of Parliamentary confirmation, similar to that dealt with in the *Electricity Commissioners* case. Under that Act, the Minister of Health was made the confirming authority for slum-clearance schemes. Before he could confirm any scheme he was required to hold a public local inquiry, and his confirmation order, when made, was to "have effect as if enacted in this Act." The type of improvement scheme which the Minister could confirm was defined in the Act as a scheme "for the rearrangement and reconstruction of the streets and houses within the area, or of some such streets and houses"; or, in other words, to improve the slum area by rearranging and reconstructing the streets and houses therein. It had, however, become the practice for such schemes to confer upon the local authority the power to sell, lease, or otherwise dispose of the area in question. "The whole of the cleared area shall be sold, leased or otherwise disposed of as the council may think fit, or may be appropriated or used by the corporation for any purpose approved by the Minister of Health."

What this meant in practice is shown by a scheme in the city of Derby, where the *vires* of the matter was finally adjudicated. The local authority there was intending to acquire compulsorily the area in question and then to dispose of same, as they saw fit, as corporation property, "not, of course, for private profit or for any corrupt motive, but for what was deemed to be general municipal development and advantage, though not of the kind contemplated by this Act."<sup>53</sup> With this in view, the authority, under the scheme, was going to buy at cleared values small plots of land in the heart of Derby with the avowed object of selling them for the best prices they could obtain. In *Rex v. Minister of Health; ex parte Davis*,<sup>54</sup> the Divisional Court granted a writ of prohibition to restrain the Minister of Health from proceeding to confirm the proposed scheme on the ground that it was not

<sup>53</sup> Allen, *op. cit.* *supra* note 33, at 135.

<sup>54</sup> [1929] 1 K. B. 619.

a scheme within the meaning of the Act and that consequently the Minister had no jurisdiction to consider it, and the decision was affirmed by the Court of Appeal. The proposed scheme was clearly *ultra vires*. "Under the name, and the agreeable name, of an improvement scheme, this particular council is minded to acquire a slice of very valuable land in the heart of the city of Derby, not for any purpose of rearrangement or reconstruction, but for the purpose, if and when the local authority thinks fit, of resale, and of course, of resale at the highest obtainable price."<sup>55</sup> "I can find no warrant," said Lord Hanworth, M.R., "for holding that a scheme for mere demolition without any proposal for replacement or reconstruction, or for substitution, is within the Act."<sup>56</sup>

The writ of prohibition was consequently issued on the authority of *Rex v. Electricity Commissioners*. "It is common ground," Lord Hewart, C.J., admitted, "that, if this scheme should be approved or confirmed by the Minister in a form going beyond what the Act renders lawful, there is no remedy and there is no redress." But the fact that, under the *Lockwood* doctrine, the order of the Minister was given statutory effect was all the more reason for judicial intervention at this stage. "Here, . . . this matter had reached its last stage but one; the last stage, if it were to be reached, would be the stage in which the order would have assumed all the authority of an Act of Parliament. If check there is to be, it must be imposed now."<sup>57</sup>

By the time of the *Davis* case, the courts were ready for a reconsideration of the implications of Lord Herschell's doctrine. "An interval of thirty-six years had not dealt kindly with the

<sup>55</sup> *Id.* at 624, per Lord Hewart, C.J.

<sup>56</sup> *Id.* at 637.

<sup>57</sup> *Id.* at 626-27. The *Davis* type of case is now precluded under the Housing Act procedure, which bars the prerogative writs either before or after the confirmation by the Minister. Housing Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 51, Sched. 2.

attitude of mind that was responsible for *Lockwood's Case*.”<sup>58</sup> By 1929, the courts were in the forefront of attempts to reassert judicial controls over the Executive. The constitutional dangers in the doctrine of Executive finality had by then become only too apparent. “It is a remarkable thing,” asserted a witness before the Committee on Ministers’ Powers, “that not one of the schemes confirmed by [the Minister of Health] up to the year 1929, as far as can be ascertained, was a valid scheme in that the requirements of the Act had been complied with by local authorities and the Minister.”<sup>59</sup> Under the *Lockwood* case, however, such schemes, even if clearly *ultra vires*, were of statutory efficacy, once they had been confirmed. It was only in the comparatively rare case that the courts could intervene by way of prohibition before the stage of confirmation had been reached. *Rex v. Electricity Commissioners* and *Davis’* case, though indicative of the judicial desire to get around the *Lockwood* doctrine wherever possible, were thus of little practical effect, for in most cases the final stage was reached before the courts could intervene.

In view of the fact that all of the schemes under the 1925 Housing Act were framed in the same terms as those which were held invalid in the *Davis* case, and since the holding of that case had no effect upon those schemes which had already been confirmed, it was decided by the National Federation of Property Owners, a large association of landlords, to take one of these cases where the scheme had been so confirmed as a test case.<sup>60</sup> This was the case of *Minister of Health v. Rex; ex parte Yaffe*.<sup>61</sup> It is not proposed to go into detail through the complicated factual situation. Suffice it to say that the facts were similar to those in the *Davis* case. Here, too, the improvement scheme as prepared by the local authority was *ultra vires* under that decision, and, as the

<sup>58</sup> Willis, *The Parliamentary Powers of English Government Departments* (1933) 76.

<sup>59</sup> Sir John W. Lorden, *Minutes of Evidence*, 68.

<sup>60</sup> *Id.* at 72.

<sup>61</sup> [1931] A. C. 494.

Attorney-General frankly admitted, if proper steps had been taken before the confirmation order of the Minister was made, a writ of prohibition restraining the Minister from proceeding further in the matter could well have been issued. The scheme in this case, however, had been confirmed by the Minister with substantial modifications, so that, as confirmed by him, it was a valid improvement scheme within the Act. The bare question before the courts, therefore, was whether the Minister could by the modifications in his confirming order cure what had been an invalid scheme when it had been presented to him. The mere consideration of this point necessitated a reconsideration of the *Lockwood* doctrine, for, under it, *all* judicial consideration of the validity of the ministerial action was precluded.

The opinions in the House of Lords in *Yaffe's* case are not very satisfactory, it must be admitted, from the point of view of clarifying the law. Their lordships were clearly of the opinion that the "have effect as if enacted in this Act" clause did not preclude judicial consideration of the *vires*; but there was the need to pay at least lip service to *Lockwood's* case. Then, too, the holding of the House on the question directly before it—that the Minister could validate a scheme through his modifications and that the scheme here as confirmed by the Minister was a valid scheme, despite its earlier defects<sup>62</sup>—made its observations on the effect of the *Lockwood* type of clause purely by way of *obiter*. The result is that there is still no authoritative direct holding on its effect. "Whereas previously there were dicta of the House of Lords in favour of the absoluteness of the clause, there are now countervailing dicta in favour of its limitation!"<sup>63</sup>

Viscount Dunedin, who delivered the leading opinion, starts by asserting that there must be limits to the power conferred under this kind of clause. "It is evident that it is inconceivable

<sup>62</sup> In this, their lordships differed with the Court of Appeal. See [1930] 2 K. B. 98, 137.

<sup>63</sup> Allen, *op. cit. supra* note 33, at 140.

that the protection should extend without limit. If the Minister went out of his province altogether, if, for example, he proposed to confirm a scheme which said that all the proprietors in a scheduled area should make a per capita contribution of £5 to the municipal authority to be applied by them for the building of a hall, it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect it could not be touched."<sup>64</sup> After touching upon the language of Lord Herschell in the *Lockwood* case, he goes on to say:

"What that comes to is this: The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. It would be otherwise if the scheme had been, per se, embodied in a subsequent Act, for then the maxim to be applied would have been 'Posteriora derogant prioribus.' But as it is, if one can find that the scheme is inconsistent with the provisions of the Act which authorizes the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in certiorari."<sup>65</sup> In other words: "The Minister's jurisdiction to make an order is under the Act strictly conditioned, and it is only when what is done falls within the limits of the conditions imposed that the order receives the force conferred by the sub-section in question."<sup>66</sup>

In the light of this language, it can be asserted that a provision that a rule or order is to have effect as if enacted in the Act is merely declaratory in the sense that it no longer bars judicial inquiry into the *vires*. This at least was the opinion of the

<sup>64</sup> [1931] A. C. at 501.

<sup>65</sup> *Id.* at 503.

<sup>66</sup> *Id.* at 520, per Lord Tomlin.



Donoughmore Committee, which stated that criticisms of this type of clause have been "laid to rest" by the *Yaffe* decision, where the House laid it down that, while the provision made the order speak as if it were contained in the Act, the Act in which it was contained was the enabling Act, and if the order as made conflicted with that Act it would have to give way to the Act. "It is, therefore, clear that the validity of any order made under a provision so worded remains legally open to question, and that it is only when what is done falls within the limits of the powers conferred, and conforms to the conditions imposed, that the order acquires the force of law."<sup>67</sup>

"In my opinion," said Lord Thankerton in the *Yaffe* case, "the true principle of construction of such delegation by Parliament of its legislative function is that it confers a limited power on the Minister, and that unless Parliament expressly excludes the jurisdiction of the Court, the Court has the right and duty to decide whether the Minister has acted within the limits of his delegated power."<sup>68</sup> The *Lockwood-Yaffe* type of clause is clearly not enough to express the Parliamentary intent of exclusion of judicial jurisdiction. "When the legislature seeks to produce a broader result other language is employed, as is well illustrated by the phraseology of clause 2 of the Third Schedule of the Act now under consideration."<sup>69</sup> The clause here referred to provides that confirmation by the Minister of a compulsory purchase order for the purposes of Part III of the Act (*i.e.*, the provision of houses for the working classes) "shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act."

This type of clause, in Lord Justice Scrutton's phrase, "apparently is intended to prevent any question of ultra vires being

<sup>67</sup> Report, 40. But see Allen, *op. cit. supra* note 33, at 141.

<sup>68</sup> [1931] A. C. at 532.

<sup>69</sup> *Id.* at 520, per Lord Tomlin.

raised however flagrantly the Order in question may exceed the powers given by the Act.”<sup>70</sup> Its legal effect was considered in *Ex parte Ringer*,<sup>71</sup> which held that it completely barred judicial inquiry into the *vires*. That case dealt with a compulsory purchase order made under Section 39 of the Small Holdings and Allotments Act, 1908,<sup>72</sup> which contained a “conclusive-evidence” clause similar to that in the 1925 Housing Act, quoted previously. The language of the court, in concluding that it had no power to inquire into the validity of such an order, is very broad. Darling, J., stated that “the section gave to an order made by a public department the absolute finality and effect of an Act of Parliament. The Court of King’s Bench had no power to set aside an Act of Parliament, and it was provided by the section that it should have no more power to set aside an order made by the Board of Agriculture. Here there was a public department put in a position of absolute supremacy, and whatever the opinion of the farmers of Norfolk who came to the Court asking for relief might be about the matter, they could only say that Parliament had enacted only last year that the Board of Agriculture in acting as they did should be no more impeachable than Parliament itself.”<sup>73</sup>

The Donoughmore Committee, although of the opinion that the “conclusive-evidence” clause “seems on its face to have been designed with the express purpose of completely and finally excluding all control by the Courts,” contended that even such a provision did not completely bar judicial relief. “It is, however, we think, plain that the protection afforded even by this clause is not limitless. If the Minister of Agriculture and Fisheries went out of his province altogether in confirming an ‘order’ (i.e., a regulation) under Section 39 of the Small Holdings and Allot-

<sup>70</sup> *Rex v. Minister of Health; ex parte Yaffe*, [1930] 2 K. B. 98, 144.

<sup>71</sup> (1909), 25 T. L. R. 718.

<sup>72</sup> 8 Edw. VII, c. 36.

<sup>73</sup> 25 T. L. R. at 719.

ments Act, 1908; if, for example, he confirmed an order which provided for boiling the Bishop of Rochester's cook to death,<sup>74</sup> we doubt whether the order would be protected by this section, although, if a new Act of Parliament were to be passed expressly conferring such a power, the order would be unassailable."<sup>75</sup>

As a problem of literal interpretation of the statutory language, it is difficult to escape from the result reached in the *Ringer* case. The "conclusive-evidence" clause seems to express the legislative intent to exclude the jurisdiction of the courts in the clearest terms. It was this that led Lord Justice Scrutton to make his plea to Parliament in the *Yaffe* case on appeal not to pass legislation which places Executive power beyond judicial control. "As a matter of constitutional importance," said he, "I hope that members of Parliament and Ministers and Parliamentary draftsmen will consider whether this form of legislation is really satisfactory. It may be convenient to Ministers not to have to consider carefully whether the powers they are purporting to exercise are within their statutory authority and the powers delegated to them by statute. Parliamentary draftsmen may have got into the habit of inserting this kind of Star Chamber clause either on the instructions of the Minister or as a matter of habit without his instructions. Members of Parliament may not trouble to consider what the sections to which they are giving legislative authority really mean, but simply follow the authority of the Minister and the Government Whip. But I cannot think it desirable that when Parliament delegates authority to affect property and persons only if certain statutory conditions are observed, it should then pass clauses which, it may be contended, allow their delegates to contravene these conditions, and make ultra vires orders which cannot be controlled by the Courts which have to administer the laws of the land."<sup>76</sup>

<sup>74</sup> As an act of Parliament once provided. 22 Hen. VIII, c. 9.

<sup>75</sup> Report, 40.

<sup>76</sup> [1930] 2 K. B. at 148.

In the light of other cases, and especially from the broader point of view of the need for judicial control over Executive action, it may be questioned whether the language in *Ex parte Ringer* does not go too far. It is true that, standing alone, the "conclusive-evidence" clause seems to bar all judicial review. But, read together with the remainder of the statute in which it appears, it seems to make the safeguards provided in other parts of the Act ineffectual. "Now is it or is it not tolerably certain," asks Lord Hewart, "that the majority in Parliament were not aware of any such provision in the Bill when they passed it, and that very few of those who were aware of it had any knowledge of its effect? To provide that the confirmation of an order by the Board should be conclusive evidence that the requirements of the Act had been complied with, and that the order had been duly made and was within the powers of the Act, was a direct encouragement to the Board to disregard the requirements of the Act, and to exceed the powers intended by the Legislature to be conferred on them. In passing such a clause Parliament, it may be thought, was really stultifying itself because having inserted express provisions in the Act for the protection of persons liable to have their property taken . . . it then, by means of this 'conclusive evidence clause' rendered such provisions nugatory."<sup>77</sup> One must, therefore, reject the conclusion of the court in the *Ringer* case; indeed, the few other decisions that bear upon the point seem to have done so.

By using the same type of reasoning as the House of Lords employed in the *Yaffe* case, one can reach a result similar to that of their lordships, even for this type of provision. The "conclusive-evidence" clause may be held to imply that the Minister's discretion is, so long as he keeps within the limits which the Act allows, absolute, but the question of *vires* is still within the

<sup>77</sup> Hewart, *The New Despotism* (1929) 73. See Keir and Lawson, *Cases on Constitutional Law* (2d ed. 1933) 143, where the clause is characterized as a standing invitation to the Executive to exceed its powers.

judicial competence. The clause would thus, in Slessor's, L.J., phrase, validate ministerial action "legally intra vires but administratively imperfect,"<sup>78</sup> while leaving the jurisdictional issue open for the courts to decide. The *Yaffe* type of technique was made use of to reach this result in the Irish case of *Corporation of Waterford v. Murphy*.<sup>79</sup> The Waterford Bridge Act, 1906,<sup>80</sup> empowered the Corporation to make bylaws, rules, and regulations regarding the time and mode of vessels passing under the bridge. Such bylaws, rules, and regulations were not to be valid until confirmed by the Board of Trade; once so confirmed, however, "a printed copy of such by-laws, rules, and regulations . . . shall be conclusive evidence of the validity of such by-laws, rules or regulations in any proceeding or prosecution under the same for any purpose." The court rejected the contention of the Corporation that these words put the bylaw in issue in the same position as an act of Parliament—"that once the Board of Trade have confirmed a by-law the power to make it cannot be questioned." The words in question were held not to preclude the court from inquiring into the validity of the bylaw. Seizing upon the word "such" in the "conclusive-evidence" clause here,<sup>81</sup> it reasoned that "such by-laws" could only mean those which came within the limits of the Act. "It is clear that the word 'such' relates back to such by-laws as could be made under the earlier part of the section; that is to say, it is limited to by-laws with regard to the 'time and mode' of vessels passing through."<sup>81</sup> In other words, as in *Yaffe's* case, "if one can find that the [by-law] is inconsistent with the provisions of the Act which authorizes the [by-law], the [by-law] will be bad."<sup>82</sup>

<sup>78</sup> *Rex v. Minister of Health; ex parte Yaffe*, [1930] 2 K. B. at 170.

<sup>79</sup> [1920] 2 I. R. 165.

<sup>80</sup> 6 Edw. VII, c. 76.

<sup>81</sup> [1920] 2 I. R. at 170. *Cf. Reg. (Conyngham) v. Pharmaceutical Society*, [1899] 2 I. R. 132. See Willis, *op. cit. supra* note 58, at 103.

<sup>82</sup> *I.e.*, Viscount Dunedin's test in the *Yaffe* case. [1931] A. C. at 503.

Section 295 of the Public Health Act, 1875,<sup>83</sup> likewise contains a "conclusive-evidence" type of clause, providing that "all orders made by the Local Government Board shall be binding and conclusive in respect of the matters to which they refer, and shall be published in such manner as the board may direct." Here, too, the courts have held that their jurisdiction was not ousted. In *Attorney-General v. Hanwell Urban District Council*,<sup>84</sup> it was sought to restrain a local authority from erecting a hospital for patients suffering from infectious diseases on land compulsorily acquired for sewage disposal under the Public Health Act. The authority was acting under an order of the Local Government Board, directing them so to use the land, but it was claimed for the plaintiffs that the order of the Board was *ultra vires*. The court agreed that the Board had no jurisdiction to make any such order, for the Act did not give it the power to allow the local authority to use the land for a purpose entirely alien to that for which it was originally acquired. Nor did Section 295 "prevent the Court from considering the question of jurisdiction. It cannot be intended that an order of the Local Government Board made without jurisdiction is to be held conclusive in a court of justice. It must be the duty of the Court to inquire whether the order could be properly made. If it could properly be made, it would be conclusive under Section 295, though there might be some irregularities about it, and though perhaps it ought not to have been made,"<sup>85</sup> *i.e.*, Lord Justice Slesser's test.

One can conclude, in the light of these cases, that the "conclusive-evidence" clause, standing by itself, is not enough to oust the jurisdiction of the courts over delegated legislation, in spite of the *Ringer* decision. Or, as expressed by a strong critic of the *Waterford* case: "The decision amounts in effect to a holding

<sup>83</sup> 38 & 39 Vict., c. 55.

<sup>84</sup> [1900], 1 Ch. 51, *aff'd*, [1900] 2 Ch. 377.

<sup>85</sup> [1900] 1 Ch. at 56. See, similarly, *Fenwick v. Rural Sanitary Authority*, [1891] 2 Q. B. 216.

that a rule or by-law can never be withdrawn from review by the courts, except perhaps by a provision so blatant as to be positively indecent."<sup>86</sup> The rejection by the English courts of the doctrine of Executive finality thus seems to approach that of the courts in this country, even with the differences in the constitutional background. One must, it is true, tread very cautiously in seeking to generalize in this still largely undefined zone of English administrative law. This type of provision, as the Donoughmore Committee pointed out, has not yet been considered by the House of Lords,<sup>87</sup> and any conclusions regarding its scope and effect must, therefore, be highly tentative and intended more as a guide to the courts than as a precise statement of the existing law. But though the cases are few, as has been shown, the majority seem to point in this direction. We are, however, impelled toward this result even more by constitutional principles than by an analysis of the cases. Judicial control of delegated legislation is an essential feature of our polity. "The rule of law requires that all regulations should be open to challenge in the courts."<sup>88</sup> The courts should, therefore, hesitate before interpreting any statute so as to bar the right of review.

We are borne out in this conclusion by the judicial reception, as well, of attempts to vest Executive decisions that are judicial in nature with finality. The first type of case is that exemplified by Section 7 of the Education Act, 1902,<sup>89</sup> which provides: "If any question arises under this section between the local education authority and the managers of a school not provided by the authority, the question shall be determined by the Board of Education." It might be contended that under this the Board was made the final arbiter, for there is no provision for judicial control. So, indeed, ran the argument of the Attorney-General in

<sup>86</sup> Willis, *op. cit. supra* note 58, at 103.

<sup>87</sup> Report, 40.

<sup>88</sup> *Id.* at 61.

<sup>89</sup> 2 Edw. VII, c. 42.

the leading case of *Board of Education v. Rice*.<sup>90</sup> It was contended, said Farwell, L.J., in the Court of Appeal, that "this Court has no jurisdiction to interfere—the Attorney-General went so far as to say on any ground or in any way whatever. The Solicitor-General qualified the generality of this contention by saying 'unless they have wrongfully given themselves or assumed a jurisdiction that they did not possess.' The Solicitor-General's contention is, in my opinion, the more accurate, but it requires explanation and expansion. The point is of very great importance in these latter days, when so many Acts of Parliament refer questions of great public importance to some Government department. Such department when so entrusted becomes a tribunal charged with the performance of a public duty and as such amenable to the jurisdiction of the High Court, within the limits now well established by law. If the tribunal has exercised the discretion entrusted to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals."<sup>91</sup>

The *Rice* type of case, however, is comparatively simple to deal

<sup>90</sup> [1911] A. C. 179, 180.

<sup>91</sup> [1910] 2 K. B. 165, 178, *sub nom.*, *Rex v. Board of Education*. See Wilford v. West Riding of Yorkshire County Council, [1908] 1 K. B. 685; Blencowe v. Northamptonshire County Council (1907), 96 L. T. R. 385; *cf.* Leakey v. Dungleinsor (1891), 65 L. T. R. 152.



with. The mere absence of provision for judicial review does not bar the nonstatutory review which may be afforded through the prerogative writs. It is when we come to statutory provisions similar to the "conclusive-evidence" clause that there is more difficulty. Thus, the statute in question may provide that the Minister's decision shall be "final" or "conclusive," or may go as far as Section 14 (3) of the Roads Act, 1920,<sup>92</sup> which, as we have seen,<sup>93</sup> provides that "an order made by the Minister under this sub-section shall be final and not subject to appeal to any court." It seems obvious that, like the "conclusive-evidence" clause, the protection afforded to Executive decisions by this kind of provision is not limitless. One can, indeed, assert that it is ineffectual, at least as far as judicial control on the question of jurisdiction is concerned. The scope of review is that outlined by Lord Justice Farwell above, whether or not such provision appears.

Section 14 (3) of the Roads Act, 1920, quoted previously, has been characterized by Dr. Port as "an extreme instance of the bestowal of judicial power on an administrative authority."<sup>94</sup> Yet even such a provision does not completely bar resort to the courts on the jurisdictional question. *Rex v. Minister of Transport; ex parte H. C. Motor Works, Ltd.*,<sup>95</sup> was an application to the High Court to quash the decision of the Minister upon a licensing appeal under this section on the ground that the Minister, in purporting to decide the appeal, did not properly exercise, or exceeded his jurisdiction, or declined jurisdiction, in that he considered and acted upon extraneous matter—namely, the fares to be charged by the applicant for the license—which should not have influenced his decision. The court held that the Minister had not, in fact, acted upon extraneous matter in reaching his decision—the question of fares being one that could be taken into account upon a licensing application. The mere considera-

<sup>92</sup> 10 & 11 Geo. V, c. 72.

<sup>93</sup> *Supra* p. 74.

<sup>94</sup> Port, *Administrative Law* (1929) 201.

<sup>95</sup> [1927] 2 K. B. 401.

tion of the matter, however, indicates that the court was not precluded from going into the issue of excess or abuse of jurisdiction by the provision for finality in Section 14 (3).<sup>96</sup>

This is shown even more clearly by the language of the Court of Appeal in *Rex v. Minister of Transport; ex parte Upminster Services, Ltd.*<sup>97</sup> That case arose under Section 81 of the Road Traffic Act, 1930,<sup>98</sup> which dealt with appeals to the Minister of Transport in road-service license cases. "On any such appeal, the Minister shall have power to make such order as he thinks fit (including an order revoking a license), and any such order shall be binding." The *Upminster* case concerned the future contingent revocation of the license in question by the Minister upon such an appeal. The Court of Appeal held that the Act gave him no such power, rejecting the contention that the court could not intervene on the ground that Section 81 enabled the Minister to make any order that he saw fit—the words of that section, "though wide in form must necessarily receive some limitation from the content in which they occur." The *Yaffe* technique is used to limit the effects of the section to orders that are authorized by the Act; "such order as he thinks fit must necessarily be limited to orders in reference to the subject matter of the appeal."<sup>99</sup>

"I am not prepared to take this view of the sub-section," declared Romer, L.J., in disposing of the Minister's claim. "Plainly some limit must be placed upon the generality of the words used. No one can suppose that the Legislature intended to create a dictatorship in the person of the Minister of Transport, if and whenever an appeal happened to be brought before him under the section. It is equally incredible that the sub-section should have been intended to give the Minister the power to make any

<sup>96</sup> Cf. *Rex v. Bradford Corporation; ex parte Minister of Transport* (1926), 42 T. L. R. 524.

<sup>97</sup> [1934] 1 K. B. 277.

<sup>98</sup> 20 & 21 Geo. V, c. 43.

<sup>99</sup> [1934] 1 K. B. at 292.

order he might think fit relating to road transport in general, or even road transport in the area effected by the matter brought before him on the appeal. The sub-section, after all, is not one dealing with the powers of the Minister of Transport as such. It is dealing with his powers as an appeal tribunal exercising quasi-judicial functions, and the orders that he may make as such. The most natural, and in, in my opinion, the proper meaning of the sub-section is that the Minister may give such decision on the questions raised by any particular appeal as he may think right, and give such directions as may be necessary for giving effect to that decision. But his decision must be confined, as in the case of other judicial or quasi-judicial decisions, to the questions brought before him on the appeal, and he must not travel outside them."<sup>100</sup> The limitations of Lord Justice Farwell in the *Rice* case thus govern the exercise of judicial power by the Executive in spite of the statutory provision for administrative finality.<sup>101</sup>

The cases we have been considering tend to bear out our assertion that the question of *vires* or jurisdiction is one which is always open to the judicial cognizance. It is true that review based upon the law of *ultra vires* must, of necessity, be a limited one. We must, however, remember that, as the Attorney General's Committee on Administrative Procedure aptly pointed out: "In the whole of administrative law the functions that can be performed by judicial review are fairly limited. Its objective, broadly speaking, is to serve as a check on the administrative branch of government—a check against excess of power and

<sup>100</sup> *Id.* at 295.

<sup>101</sup> See, further, observations of Greer, L.J., in *Rex v. Minister of Health*, [1939] 1 K. B. 232, 246; *Avory, J.*, in *Rex v. Ministry of Health*; *ex parte Wycombe Guardians* (1922), 92 L. J. K. B. 373, 376; *Walthamstow Local Board v. Staines*, [1891] 2 Ch. 606. *Cf.* *St. Lucia Usines Co. v. Colonial Treasurer*, [1924] A. C. 508; *Murphy v. Rex*, [1911] A. C. 401; *Gateshead Union v. Durham County Council*, [1918] 1 Ch. 146, where the decision of the Board of Education was declared to be "final" by its own regulations.

abusive exercise of power in derogation of private right.”<sup>102</sup> Attempts to broaden the scope of review—to enable the courts to supplant, rather than restrain, administrative action—must be rejected if administration is to perform its task in the modern State. Wider review, based upon the analogy of the relationship between appellate and trial courts, loses sight of the fact that the administrative process is the outgrowth of conditions far different from those which shaped the judicial process. The differences in origin and function, in Mr. Justice Frankfurter’s phrase, “preclude the wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. . . . to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.”<sup>103</sup>

Review based upon the doctrine of *ultra vires* can, indeed, prove adequate to perform the proper functions of judicial review. In considering what these functions are, we can follow the analysis of the Attorney General’s Committee,<sup>104</sup> bearing in mind our caveat against too broad a review. “First, we expect judicial review to *check*—not to *supplant*—administrative action. . . . to continue its historic function as a brake on excursion by the administrative body beyond its lawfully delegated authority and on the excessive assumption of power by the executive.”

<sup>102</sup> Report, 76.

<sup>103</sup> Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 143-44 (1940).

<sup>104</sup> Report, 77-78.

This is the literal application of the *ultra vires* doctrine—"to restrain action beyond the bounds of the power granted. In the performance of this function, we may expect the courts to speak the final word on interpretation of law. Administrative action based upon an error in law cannot be said to have been within the authority conferred, and it is, thus, always open to the courts to consider questions of law upon review. One can, indeed, go further and place this principle upon a constitutional plane. "The supremacy of law," said Mr. Justice Brandeis in the *St. Joseph Stock Yards* case,<sup>105</sup> "demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied," and the Committee on Ministers' Powers came to a similar conclusion.<sup>106</sup>

"Judicial review may also be expected to require from the administrative branch fair consideration in its adjudications." The preservation of certain procedural fundamentals is essential to the proper exercise of jurisdiction, and we shall shortly have occasion to see how the concept of "natural justice" as a condition precedent to the employment of judicial power by the Executive has been imported by the English courts into the *ultra vires* doctrine.<sup>107</sup> "Finally, judicial review may be expected to check extremes of arbitrariness or incompetence in administrative adjudications." Here, we are on more debatable ground, at least in so far as review in Britain is concerned. In this country, Executive action is held to be arbitrary unless there is a rational relation between it and the enabling act. We have seen above that, under the present English law, the courts do not have the authority to pass upon the reasonableness of departmental regulations. The assertion of such power is, however, consistent with review based upon the doctrine of *ultra vires*, and the language

<sup>105</sup> *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 84 (1936).

<sup>106</sup> Report, 108.

<sup>107</sup> *Infra* c. VII.

of Lord Justice Scott in the *Sparks* case,<sup>108</sup> it is hoped, may indicate a change in the judicial attitude. With regard to administrative adjudications, arbitrariness has been checked by the American courts by the requirement that administrative determinations must be supported by substantial evidence. This requirement, too, is consonant with review based upon the jurisdictional theory, for adjudications rendered without any evidentiary basis cannot be said to be within the power delegated. The difficulty here is that, in going into the question of evidentiary support, the reviewing court must, to some extent, deal with the merits. The scope of review upon matters of "law," "fact," "jurisdictional fact," and the like, has, as we shall see, troubled the courts in England no less than it has those in this country. What is of importance, here, is that review based upon the doctrine of *ultra vires* permits some judicial consideration of these questions.

Review focused upon the jurisdictional question is thus broad enough to enable the courts effectively to control Executive action. Attempts to bar review upon the question of *vires* have been treated as ineffectual by the judiciary on both sides of the Atlantic. Yet it must be admitted that the possibility of upsetting established administrative schemes, ex post facto, as it were, may constitute a serious hindrance to effective administration. This is amply shown by the English experience under some of the housing cases. Slum clearance in Derby and Liverpool was paralyzed by the *Davis* and *Yaffe* decisions. "It must be remembered . . . that administrative action must frequently be rapid and that any decision rendered by a Court may affect thousands of administrators. Judicial process is dilatory and expensive. The knowledge that litigation was proceeding on the Housing Act, 1925, effectively held up a whole host of housing schemes."<sup>109</sup>

An attempt to overcome this difficulty was made in Section 4

<sup>108</sup> See *supra* p. 174.

<sup>109</sup> Jennings, "Local Government Law" 51 L. Q. Rev. 180, 192 (1935).

of the Rating and Valuation Bill, 1928, which provided that: "If . . . it is made to appear to the Minister of Health that a substantial question of law has arisen . . . and that, unless that question is authoritatively determined, want of uniformity or inequality in valuation may result, the Minister may submit the question to the High Court for its opinion thereon, and the High Court, after hearing such parties as it thinks proper, shall give its opinion on the question." In other words, the difficulties arising out of the *ex post facto* invalidation of administrative schemes were to be avoided by an advisory opinion procedure, under which the validity of the Executive action could be tested at the outset.

The constitutional storm that arose over this proposal is of great interest to the American observer in the light of the antipathy of most American courts to the advisory-opinion procedure. In the absence of express constitutional provisions, the rendering of advisory opinions is, with us, beyond the power of the judiciary.<sup>110</sup> This is well shown by the consistently hostile attitude of the Supreme Court toward anticipatory judgments. *Muskrat v. United States*,<sup>111</sup> where the Court refused to determine in the abstract the validity of a statute, in the absence of an existing "case" or "controversy," is the leading case. "Is such a determination within the judicial power conferred by the Constitution," asks Mr. Justice Day, "as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."<sup>112</sup>

The great weakness of an advisory opinion is that, being decided, as it were, *in vacuo*, it is divorced from the real life of actual facts. "However much provision may be made on paper

<sup>110</sup> Cardozo, J., in *Self Insurers Association v. State Industrial Commission*, 224 N. Y. 13, 16 (1918).

<sup>111</sup> 219 U. S. 346 (1911).

<sup>112</sup> *Id.* at 361.

for adequate arguments (and experience justifies little reliance) advisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting. In the attitude of court and counsel, in the vigor of adequate representation of the facts behind legislation (lamentably inadequate even in contested litigation) there is thus a wide gulf of difference, partly rooted in psychologic factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law. Advisory opinions are rendered upon sterilized and mutilated issues."<sup>113</sup> This is aptly shown by the comment of Judge Cardozo on the certification to the court of the question of the power of the New York industrial commission to require certain death-benefit payments. "The record now before us supplies a pointed illustration of the need that the judicial function be kept within its ancient bounds. Some of the arguments addressed to us in criticism of the resolution apply to all awards for death benefits; others to awards made before June 1916; others to awards where one of the dependents is a widow. It is thus conceivable that the proposed resolution may be valid as to some carriers and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait till it arises."<sup>114</sup>

Similar considerations led the bulk of the English legal profession strongly to oppose the proposed procedure in the Rating and Valuation Bill "as constituting a dangerous innovation on fundamental doctrines of English law." These objections are well summed up in an editorial in *The London Times* upon the proposal.<sup>115</sup> The Executive object—convenience and economy in

<sup>113</sup> Frankfurter, "A Note on Advisory Opinions" 37 *Harv. L. Rev.* 1002, 1006 (1924).

<sup>114</sup> *Self Insurers Association v. State Industrial Commission*, 224 *N. Y.* 13, 17 (1918).

<sup>115</sup> April 27, 1928, p. 17, col. 2.



administration—is not sufficient ground for the adoption of this procedure. “They are asking the country to pay a very high price for this object, even if the clause should secure it. They are reintroducing, as was noted in debate, the practice of the Stuarts, under which the Executive—then the King in person—took the opinion of the Judges upon questions which they might afterwards have to determine . . . . There are few principles, if any, more important, or better established, in English law than those which this clause, as it now stands, would infringe. It would compel the Judges in certain cases to act at the bidding of the Executive as its official advisers, and it would further oblige them to give their opinion upon general questions, which English Judges have always refused to do.” Faced with this almost universal opposition, the Government decided to abandon the proposal, and the Lord Chancellor accordingly announced the withdrawal of the objectionable clause from the Bill, saying that “it was far better that we should abandon the effort to obtain a power of this kind than that we should run any risk of an impression being created, rightly or wrongly, in the minds of the public that there was any connection being established between the Executive and the Judiciary and infringement of that independence of the Judiciary which is the palladium of the liberty of the subject.”<sup>116</sup>

But the fundamental problem with which the Rating and Valuation Bill sought to deal still remains. There is still the need to minimize the difficulties arising out of the judicial invalidation of administrative schemes. The quashing of an elaborate slum-clearance scheme, such as that involved in the *Davis* case, for example, may frustrate a long-established administrative development. “The confusion which would arise if a scheme were

<sup>116</sup> Quoted in Hewart, *op. cit. supra* note 77, at 132. For a contemporary discussion of the problem, see Wade, “Consultation of the Judiciary by the Executive” 46 L. Q. Rev. 169 (1930); Allen, “Administrative Consultation of the Judiciary” 47 L. Q. Rev. 43 (1931).

suddenly to be ruled illegal after it had been in operation for any length of time can readily be appreciated: in fact it would be impracticable to set up a Board with extensive powers of holding property, incurring liabilities, and, perhaps, of trading, if the courts could hold at any time that the scheme and, indeed, the very existence of the Board had been a nullity from the start."<sup>117</sup> It is true that logically, as Dr. Allen has pointed out, this "argument is not impressive, for it might be applied with equal force to many operations of the law."<sup>118</sup> Yet the obvious need for some limitation upon the right of review in this field is so great that one might well explore the possibility of some compromise between the departmental desire for Executive finality and the individual insistence upon unlimited review.

The Committee on Ministers' Powers spent much time upon this problem. The departmental witnesses before it insisted upon the impracticability from the point of view of effective administration of allowing an unlimited right of review in certain cases. "Perhaps as good an example to take as any is the power of the Minister of Health to make orders confirming town planning schemes. These schemes cover wide areas and are permanent in their operation. They may affect titles to and dealings in land and buildings and any possibility that years hence their validity might be impeached, even on wholly insufficient grounds, would create such administrative difficulties as to make the task both of the Ministry of Health and of the local authorities concerned almost impossible."<sup>119</sup>

The departments differentiated in this between "regulations," that is, rules of general application, and "orders," that is, instruments relating to particular areas or particular authorities, or classes of persons—a distinction which, as we have seen, is not

<sup>117</sup> Report of the Ministry of Agriculture on the Agricultural Marketing Act, 1931, p. 17, quoted in Willis, *op. cit. supra* note 58, at 104, n.2.

<sup>118</sup> Allen, *Law and Orders* (1945) 157.

<sup>119</sup> Sir Maurice L. Gwyer, Minutes of Evidence, 4.

fully carried out in the statute book.<sup>120</sup> Generally speaking, the departments did not object to regulations (as distinct from orders) being left open to challenge at any time on the *vires* question.<sup>121</sup> "It is true that as an administrator one might have difficulties arising from [this principle]," said the Secretary to the Ministry of Health—in the case of certain regulations, such as stock regulations, certainty is of primary importance—"but one must, I think, accept those difficulties and take all the more care that when the regulation is made one is clear it is *intra vires*." <sup>122</sup> Orders of limited application, however, stand on a different footing. The orders with which the Ministry of Health is chiefly concerned in this connection, for example (mostly orders for the compulsory purchase of land or orders confirming housing schemes), affect the ownership of property, and a court decision upsetting such an order is likely to be more disastrous than in the case of most regulations. "Thus, where land has been bought and buildings either demolished or erected, a decision which had the effect of invalidating the title of the acquiring authority would probably necessitate an Act of Indemnity." <sup>123</sup>

The evidence upon this topic, therefore, "pointed in the direction of a limitation both of time and of jurisdiction for appeals." <sup>124</sup> The Donoughmore Committee Report, though asserting that all delegated legislation should be open to challenge in the courts as a matter of constitutional principle, recognized an exception "when Parliament deliberately comes to the conclusion that it is essential in the public interest to create an exception and to confer on a Minister the power of legislating with immunity from challenge." <sup>125</sup> Such exceptions are desirable in

<sup>120</sup> *Supra* p. 107.

<sup>121</sup> Minutes of Evidence, 124, 269.

<sup>122</sup> *Id.* at 139.

<sup>123</sup> *Id.* at 160. For examples dealing with the Ministry of Transport, see *id.* at 269.

<sup>124</sup> Allen, *Law and Orders* (1945) 157.

<sup>125</sup> Report, 61.

the type of cases to which we have been referring, *i.e.*, orders of local application, where finality is desirable. "But we are of opinion that when for such reasons the regulation cannot remain indefinitely open to challenge, there should be an initial period of challenge of at least three months and preferably six months. Apart from emergency legislation, we hardly think there can be any case so exceptional in nature, as to make it both politic and just to prohibit the possibility of challenge altogether."<sup>126</sup> A similar time limit was proposed for appeals on points of law from ministerial decisions of a judicial nature.<sup>127</sup>

Yet even such a limited review, the departments felt, could not be allowed in certain cases. "If you take a Town Planning Scheme or a Slum Clearance Scheme, and you say that the Order comes into force unless it is challenged within so many days or weeks or whatever it is, that means that the Scheme will be held up for that period, and of course we have constant criticisms and complaints of the time which it takes to carry out Slum Clearance Schemes. For years we have been trying to expedite that procedure. It is difficult, and the time spent is long, and one rather hesitates to recommend something which would have the effect of adding X days to that time."<sup>128</sup> But this clearly goes too far, as it would bar all review. Administrative convenience must give way, at least for a limited period, to the need for judicial control. As pointedly put by Sir Warren Fisher: "If Utopia is worth having, it is worth waiting for, is it not?"<sup>129</sup>

The proposed solution left open to the public "the right of saying 'the Minister has exceeded the powers that Parliament intended him to have', while on the other hand . . . made it necessary for the public affected to be reasonably expeditious in

<sup>126</sup> *Id.* at 62.

<sup>127</sup> *Id.* at 108.

<sup>128</sup> Sir Arthur Robinson, Secretary to the Ministry of Health, Minutes of Evidence, 134. See, also, *id.* at 113.

<sup>129</sup> *Ibid.*

bringing their grievances before the Court."<sup>130</sup> There is a difficulty here, it is true, in the point of reasonable expeditiousness, for the ground of objection to the Executive action might not appear until long after the statutory time limit has elapsed. This difficulty is much more likely to arise in the case of regulations of general applicability. Thus, where the relevant Minister makes certain pension regulations, it would be unfair to a claimant for an old-age pension who reaches the statutory age many years later to be barred from challenging the validity of a regulation, because the time limit for challengeability had expired long before. In so far as the same difficulty arises with regard to orders of limited application, the individual interest, here, in the right of unlimited access to the courts must give way, after being protected for a short period, to the social interest in the validity of public-service schemes. In such cases, as Sir Leslie Scott aptly pointed out, "it is always a question of balancing advantages and disadvantages and of choosing something that may not be perfection but is the best that is practicable."<sup>131</sup>

The kind of time limit suggested by the Donoughmore Committee had been provided for in several earlier statutes, notably the Poor Law Amendment Act, 1834,<sup>132</sup> which fixed a twelve-month limit for certiorari against orders made under it. The Housing Act, 1930,<sup>133</sup> "anticipated the recommendation of the Donoughmore Committee by introducing a new form of limited appeal."<sup>134</sup> The validity of slum clearance and compulsory purchase orders, confirmed by the Minister of Health, was under Section 11 of that Act subject to challenge in the High Court within six weeks after the publication of the notice of confirmation, and with this exception an order was not, either before or

<sup>130</sup> Sir Leslie Scott, *id.* at 134.

<sup>131</sup> *Id.* at 150.

<sup>132</sup> 4 & 5 Will. IV, c. 76. See Local Government Act, 1894, 56 & 57 Vict., c. 73, § 42.

<sup>133</sup> 20 & 21 Geo. V, c. 39.

<sup>134</sup> Allen, *Law and Orders* (1945) 158.

after its confirmation, to be questioned by "prohibition or certiorari or in any legal proceedings whatsoever." It would seem that this statutory provision effectively bars all review after the expiration of the specified period and such, indeed, was the conclusion of the Court of Appeal in *Rex v. Middlesex Justices; ex parte Walsall Union*,<sup>135</sup> with regard to a similar section in the Local Government Act, 1894.

The 1930 Housing Act not only limited the time during which the Minister's order could be challenged, but also stated the grounds upon which the court might invalidate the order. The court, "if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant." This, however, merely seems to restate the normal grounds for judicial intervention—*i.e.*, those based upon the *ultra vires* doctrine—for both of the grounds specified, except, perhaps, for the requirement of "substantial prejudice,"<sup>136</sup> rest upon questions of jurisdiction. The scope of review under this special statutory form of appeal is thus the same as that under the prerogative writs.<sup>137</sup>

The type of statutory review provided by Section 11 of the Housing Act, 1930, has been substantially re-enacted in subsequent English statutes, where similar circumstances make such appeals desirable.<sup>138</sup> Statutory appeals—though limited to points

<sup>135</sup> [1907] 2 K. B. 581.

<sup>136</sup> See *In re Bowman*, [1932] 2 K. B. 621.

<sup>137</sup> This is shown by the wording of Section 162 of the Local Government Act, 1933, 23 & 24 Geo. V, c. 51. See, also, *Errington v. Minister of Health*, [1935] 1 K. B. 249, 265.

<sup>138</sup> *E.g.*, Land Drainage Act, 1930, 20 & 21 Geo. V, c. 44, Sched. 3; Public Works Act, 1930, 20 & 21 Geo. V, c. 50, Sched. 1; Local Government Act, 1933, 23 & 24 Geo. V, c. 51, § 162; Water Supplies (Exceptional Shortage Orders) Act, 1934, 24 & 25 Geo. V, c. 20, § 9; Special Areas (Development and Improvement) Act, 1935, 25 & 26 Geo. V, c. 1, Sched. 3; Air Navigation Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 44, Sched. 1; Housing Act, 1936, 26

of law, and likewise strictly limited in time—have also been provided, in line with the recommendation of the Donoughmore Committee,<sup>139</sup> in many of the statutes conferring powers of a judicial nature upon the Executive since 1932.<sup>140</sup> The tendency has thus been for statutory review provisions to take over the field. This trend has not, however, gone as far as it has under federal legislation in this country, where “statutes creating administrative tribunals generally provide methods by which their determinations may be reviewed.”<sup>141</sup> Nor have all English statutes since 1930 adopted the Housing Act procedure.<sup>142</sup> The review available in such cases seems to be only that under the prerogative writs. As indicated above, the difference between statutory and nonstatutory review in England is not as great as in many American jurisdictions, for the scope of review under statutory appeals, such as that allowed by the Housing Act, is, in practice, very like that under the prerogative writs.

Restriction upon the time within which review is to be available appears to be a very useful device to deal with the type of case we have been discussing; *i.e.*, where finality is desired at some point because of the disastrous consequences for administration

Geo. V & 1 Edw. VIII, c. 51, Sched. 2; Livestock Industry Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 50, § 50; Sea Fish Industry Act, 1938, 1 & 2 Geo. VI, c. 30, § 31; Education Act, 1944, 7 & 8 Geo. VI, c. 31, § 90; Town and Country Planning Act, 1944, 7 & 8 Geo. VI, c. 47, § 16; Distribution of Industry Act, 1945, 8 & 9 Geo. VI, c. 36, § 12; Water Act, 1945, 8 & 9 Geo. VI, c. 42, Sched. 2; Acquisition of Land (Authorisation Procedure) Act, 1946, 9 & 10 Geo. VI, c. 49, Sched. 1; New Towns Act, 1946, 9 & 10 Geo. VI, c. 68, § 1; Agriculture Act, 1947, 10 & 11 Geo. VI, c. 48, § 92; Town and Country Planning Act, 1947, 10 & 11 Geo. VI, c. 51, § 41; Gas Act, 1948, 11 & 12 Geo. VI, c. 67, § 11.

<sup>139</sup> Report, 108.

<sup>140</sup> *E.g.*, Local Government Act, 1933, 23 & 24 Geo. V, c. 51, § 231; Unemployment Insurance Act, 1935, 25 & 26 Geo. V, c. 8, § 84; National Health Insurance Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 32, § 161; Coal Act, 1938, 1 & 2 Geo. VI, c. 52, Sched. 3, 17 (2); Nurses Act, 1943, 6 & 7 Geo. VI, c. 17, § 5; Pensions Appeal Tribunals Act, 1943, 6 & 7 Geo. VI, c. 39, § 8.

<sup>141</sup> Report of the Attorney General's Committee, 82.

<sup>142</sup> *E.g.*, Public Health (London) Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 50, § 168; Coast Protection Act, 1939, 2 & 3 Geo. VI, c. 39.

in possible future invalidations. *Yakus v. United States*,<sup>143</sup> which held that the time limit prescribed for challenging the regulations of the Price Administrator under the Emergency Price Control Act of 1942<sup>144</sup> did not violate due process, indicates that similar statutory provisions would be valid in this country, provided, of course, that the period allowed is not unreasonably short in view of the circumstances of the case. One may question, indeed, whether the six weeks given under the English Housing Act provisions are ample enough for that type of case. The comparatively short period allowed for appeal in the *Yakus* case—thirty days after the denial by the Price Administrator of a protest submitted to him—was sustained by the Court only “in view of the urgency and exigencies of wartime price regulation.”<sup>145</sup> It may be doubted whether a similar statute would be sustained by our courts in the absence of pressing urgency. Apart from the possible inadequacy of the time allowed, the Housing Act kind of provision seems to represent a satisfactory compromise between the individual and social interest in these cases. Care must be taken, however, to limit its use to the Housing Act type of orders, for, as we have noted, grave injustices may result from its extension to regulations of general applicability. In the case of such regulations, there must be no statutory restrictions upon the right of review.<sup>146</sup>

<sup>143</sup> 321 U. S. 414 (1944).

<sup>144</sup> 56 Stat. 23.

<sup>145</sup> 321 U. S. at 435.

<sup>146</sup> See *Reg. v. Sankey* (1878), 3 Q. B. D. 379, where a statutory time limit upon the review of such regulations was held not to bar judicial consideration of the *vires*.



## CHAPTER VII

### 2. NATURAL JUSTICE

One of the prime functions of judicial control of Executive determinations is to ensure that the "fundamentals of fair play"<sup>1</sup> have been preserved. In this country, this is done through the concept of procedural due process. "The inexorable safeguard which the due process clause assures," said Mr. Justice Brandeis in *St. Joseph Stock Yards Co. v. United States*,<sup>2</sup> "is not that the court may examine whether the [administrative] findings are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

In this country, the requirements of due process are constitutionally imposed, and the judicial intervention to ensure conformity to them is an organically prescribed feature of our polity. There can, of course, be no such constitutional requirements, literally speaking, in Britain; but the courts there have endeavored to assure administrative fair play through the concept of *natural justice*. "It has been truly said," as the Committee on Ministers' Powers pointed out, "that, however much a Minister in exercising such [*i.e.*, judicial] functions may depart from the usual forms

<sup>1</sup> The term is that of Mr. Justice Frankfurter in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143 (1940).

<sup>2</sup> 298 U. S. 38, 73 (1936).

of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against 'natural justice.'"<sup>3</sup>

Review to ensure compliance with the principles of "natural justice" is, as we have already seen, but a branch of review based upon the doctrine of *ultra vires*, for the observance of procedural essentials is fundamental to the proper exercise of jurisdiction. Thus, the principles of "natural justice" can be said to be as much a part of English administrative law as the procedural requirements which the Supreme Court has held are required of the administrative process in this country. These principles are implied as a condition precedent to the lawful exercise of judicial power by the Executive. This is well shown by the language of Lord Justice Bowen in a leading case on the employment of such power by bodies other than the ordinary courts. The enabling act merely prescribed the exercise of such power after "due inquiry": "The statute says nothing more, but in saying so much it certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard."<sup>4</sup>

Control of Executive procedure in Britain is thus based upon the concept of "natural justice." The use of such a concept, however, must immediately involve us in some difficulties, for it has moral as well as legal connotations. As put by the Donoughmore Committee, it "must be regarded as belonging to the field of moral and social principles and not as having passed into the category of substantive law, so as necessarily to make every act obnoxious to its canons a transgression of a legal rule recognised and enforced as such by our Courts."<sup>5</sup> The weakness of legal

<sup>3</sup> Report, 75.

<sup>4</sup> *Leeson v. General Council of Medical Education* (1889), 43 Ch. D. 366, 383.

<sup>5</sup> Report, 75.

analysis based upon wholly ethical precepts has been apparent ever since Austin. "With the goodness or badness of laws [General Jurisprudence] has no immediate concern."<sup>6</sup> It is not enough merely to find a moral principle and then to formulate it in legal form. "We must ask how far it has to do with things that may be governed by legal rules. We must ask how far legal machinery of rule and remedy is adapted to the claims which it recognizes and would secure. We must ask how far, if we formulate a precept in terms of our moral principle, it may be made effective in action. Even more we must consider how far it is possible to give the moral principle legal recognition and legal efficacy by judicial action or juristic reasoning, on the basis of the received legal materials and with the received legal technique, without impairing the general security by unsettling the legal system as a whole."<sup>7</sup> It was the failure adequately to see this—the tendency to confuse law with morals and to assume that moral principles *qua* moral principles must have some legal validity—that led to the decline of the eighteenth-century law-of-nature school and the discrediting of natural law principles.

The difficulties involved in deriving legal results from ethical principles led Lord Shaw of Dunfermline to reject the whole concept of "natural justice" in a famous passage in *Local Government Board v. Arlidge*,<sup>8</sup> the leading English case on the exercise of judicial power by the Executive. "The words 'natural justice,'" he declared, "occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of

<sup>6</sup> Austin, *Jurisprudence* (4th ed. 1873) 1107. See Gray, *Nature and Sources of the Law* (2d ed. 1921) 139.

<sup>7</sup> Pound, *Law and Morals* (2d ed. 1926) 63.

<sup>8</sup> [1915] A. C. 120, 138.

judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term 'natural justice' means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and in so far as it is resorted to for other purposes, it is vacuous."

But this statement clearly goes too far. "Although 'natural justice' does not fall within those definite and well-recognised rules of law which English Courts of Law enforce, we think it is beyond doubt that there are certain canons of judicial conduct to which all tribunals and persons who have to give judicial or quasi-judicial decisions ought to conform. The principles on which they rest are we think implicit in the rule of law. Their observance is demanded by our national sense of justice; and it is, we think, the desire to secure safeguards for their observance, more than any other factor, which has inspired the criticisms levelled against the Executive and against Parliament for entrusting judicial or quasi-judicial functions to the Executive."<sup>9</sup> Lord Shaw, with all respect, fails to distinguish between the forms of justice and its underlying inherent principles. "It is one thing to depart from the procedure adopted at common law, and another, and a very different thing, to adopt a procedure which is inconsistent with the principles of natural justice on which the English common law is based."<sup>10</sup> As Dean Pound has aptly

<sup>9</sup> Report of the Committee on Ministers' Powers, 76.

<sup>10</sup> Vaughan Williams, L.J., in *Rex v. Local Government Board*, [1914] 1 K. B. 160, 176.

pointed out: "There are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding."<sup>11</sup> The conformance of Executive action to these fundamentals is essential to the maintenance of the rule of law. It is for the courts to ensure such conformity—whether it be through the constitutional concept of "due process" or through the ethicolegal device of "natural justice."

Perhaps the fundamental principle upon which justice in the common-law world is based is the right to be heard—*audi alteram partem*. "It is a rule founded upon the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule."<sup>12</sup> Implicit in this is the requirement of due notice as a condition precedent to the proper exercise of administrative power. The right to a hearing, however generously preserved, is of little use unless those affected are informed beforehand of the contemplated action. "Notice, in short, must be given; and it must fairly indicate what the respondent is to meet."<sup>13</sup>

In this country, adequate notice is constitutionally required as an element of due process.<sup>14</sup> In most cases, the constitutional issue does not arise, for the statutory provisions on the point are generally adequate. The concept of "natural justice," upon which the English courts have based their review of Executive procedure, would likewise seem to require administrative notice, at least in those cases where the governing statute is silent. If, as we shall

<sup>11</sup> Administrative Law (1942) 75.

<sup>12</sup> Earl, J., in *Stuart v. Palmer*, 74 N. Y. 183, 190 (1878).

<sup>13</sup> Report of the Attorney General's Committee, 63.

<sup>14</sup> *Londoner v. Denver*, 210 U. S. 373 (1908). This is true, of course, only as a general principle. The exceptions to it, starting with *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (U. S. 1855), do not, however, detract from its validity as a general principle.

see, the right to be heard is a fundamental element of "natural justice," so also should the right to notice be included in that concept. However, the English courts have not gone so far, and the rule, as generally stated, requires notice only where expressly prescribed by statute.<sup>15</sup>

Some of the cases, indeed, are even narrower. Thus, Section 6 of the Coal Mines Regulation Act, 1896,<sup>16</sup> provided that "a Secretary of State on being satisfied that any explosive is or is likely to become dangerous, may, by order, of which notice shall be given in such manner as he may direct, prohibit the use thereof in any mine or in any class of mines." Despite this express provision, the court upheld the conviction of the appellant in *Jones v. Robson*<sup>17</sup> for contravening an order under this section, although there was no evidence that the required notice had been given. Bruce, J., thought that the publication of the notice was not a prerequisite to the validity of the order. "I think that the directions contained in the section about notice are directory only; that the order comes into force when it is made by the Secretary of State, and although power is given to him to give notice of the order and to direct how notice shall be given of the order, yet that is not essential to the order coming into operation, but is merely directory, and the fact that no notice is given does not prevent the order having effect. Therefore I have come to the conclusion that the order was good and valid, although there is no evidence before us of any notice given by the Secretary of State, or of any direction as to how the notice should be given."<sup>18</sup>

The *Jones* case would seem to go too far. What is the value of the safeguard which has been expressly inserted by the legisla-

<sup>15</sup> See *Bird v. Vestry of St. Mary Abbots* (1895), 72 L. T. R. 599. Cf. *Irving v. Patterson*, [1943] Ch. 180.

<sup>16</sup> 59 & 60 Vict., c. 43.

<sup>17</sup> [1901] 1 K. B. 673.

<sup>18</sup> *Id.* at 680. Cf. *Crook v. Pritchard*, [1920] 3 K. B. 377; *In re Berkhamsted Grammar School*, [1908] 2 Ch. 25; *Duncan v. Knill* (1907), 96 L. T. R. 911.

ture if the Executive can disregard it at will? This is especially true in a case like this, where violation of the administrative command may result in penal liability. The better view would, therefore, seem to be that statutory prescriptions regarding notice are mandatory, and not merely directory, and the failure to observe them will invalidate the administrative action. This is well shown by *Wirral Rural Council v. Carter*,<sup>19</sup> where the administrative action was held invalid because of the noncompliance with the statutory requirement of notice, although, as Lord Alverstone, C.J., pointed out: "I should have been glad to feel myself able to come to a contrary conclusion, for there are no merits in the objection raised."<sup>20</sup>

Even assuming, however, that notice must be given where the statute requires it, is the mere giving of the notice adequate to comply with the statute or is the sufficiency of the notice under the circumstances of the case open to judicial review? In *Ryall v. Hart*,<sup>21</sup> the court dealt with the validity of a notice under Section 28 (1) of the Housing, Town Planning, &c., Act, 1909,<sup>22</sup> requiring the owner of a house to execute within a specified time certain work in order to make the house reasonably fit for human habitation. Under that section, such notice had to specify "a reasonable time, not being less than twenty-one days" for the execution of such work. The King's Bench Division held that the owner was entitled to raise the question of whether the notice was a "reasonable" notice for judicial consideration, although the statute gave him a right of appeal against the notice to the Minister of Health. The giving of a "reasonable" notice was a statutory condition precedent. "If a condition precedent is prescribed by the statute for the validity of a notice it is a strong

<sup>19</sup> [1903] 1 K. B. 646.

<sup>20</sup> *Id.* at 649. See *Smart & Son v. Watts*, [1895] 1 Q. B. 219; *Robinson v. Mayor, &c., of Sunderland* (1898), 78 L. T. R. 194; *Jones v. Conway Water Supply Board* (1893), 69 L. T. R. 265.

<sup>21</sup> [1923] 2 K. B. 464.

<sup>22</sup> 9 Edw. VII, c. 44.

thing to say that the question whether or not that condition precedent has been fulfilled cannot be raised before the magistrate merely because the owner is given a right of appeal to a Government department."<sup>23</sup>

If the statutory requirement of notice is to be of any efficacy, it would seem that the court upon review should be able to go into the sufficiency of the notice given. Thus, under Section 150 of the Public Health Act, 1875,<sup>24</sup> a local authority could serve upon frontagers a notice to execute various works upon a street. Such a notice should give enough information to enable the frontagers to ascertain exactly the nature of the work required, and a notice that merely referred to the relevant section of the statute without specifying any details was consequently held to be insufficient.<sup>25</sup> Likewise, a notice that gives incorrect information can be held invalid. This is illustrated by *Whatling v. Rees*,<sup>26</sup> where the local authority had served a notice upon a houseowner to do a certain thing in order to abate a nuisance—to drain the cellar—when what was really required was something totally different; namely, to pump out the water and to carry out certain structural works.<sup>27</sup>

The judicial power, here, though extremely valuable from the point of view of ensuring conformity to the statutory requirement, may, however, be excluded by the express language of the Act. This can be shown by *Rex v. Minister of Health; ex parte Hack*,<sup>28</sup> which arose under Section 63 (1) of the Housing Act, 1935.<sup>29</sup>

<sup>23</sup> [1923] 2 K. B. at 470, per Lord Hewart, C.J. See *Ryall v. Cubbitt Health*, [1922] 1 K. B. 275.

<sup>24</sup> 38 & 39 Vict., c. 55.

<sup>25</sup> *Stourbridge Urban District Council v. Butler & Grove* (1909), 99 L. T. R. 912. See *Wood v. Widnes Corp.*, [1898] 1 Q. B. 463, where a general notice requiring the construction of certain works was held insufficient. Cf. *Rex v. Recorder of Bolton*, [1940] 1 K. B. 290; *Millard v. Wastall* (1898), 77 L. T. R. 692.

<sup>26</sup> (1915), 112 L. T. R. 512.

<sup>27</sup> The defect which vitiates the notice may be one of omission, rather than commission. *Rayner v. Mayor of Stepney*, [1911] 2 Ch. 312.

<sup>28</sup> (1937), 157 L. T. R. 118.

<sup>29</sup> 25 & 26 Geo. V, c. 40.



Under that section, "where a person upon whom notice of a clearance order or of a compulsory purchase order . . . is required to be served has duly made objection thereto on the ground that a building included therein is not unfit for human habitation, and the objection has not been withdrawn, the Minister shall not cause the public local inquiry with respect thereto to be held earlier than the expiration of fourteen days after it has been shown to his satisfaction that the local authority have served upon the objector a notice in writing stating what facts they allege as their principal grounds for being satisfied that the building is so unfit." The applicant in the *Hack* case asserted that the notices which had been served by the local authority were not such notices as the statute called for, as they did not give with sufficient particularity the facts which the authority alleged as their principal grounds for being satisfied that the property in question was unfit for human habitation. But the court held that it was barred from considering the question of the sufficiency of the notice by the language of the Act. The words of the section, said Lord Hewart, C.J., have, "no doubt, been most deliberately chosen. The moment from which the time runs is the moment when the Minister is satisfied on that particular point. The statute does not require that the objector is to be satisfied. It is the Minister who has to be satisfied . . . . In view of the plain words of that sub-section it seems to me that the result is clear. No doubt, the Minister must not be satisfied with unreasonable readiness or with culpable complacency, but otherwise it suffices that he is in fact satisfied."<sup>30</sup>

✓ The problem of administrative notice becomes a difficult one when the interests of a class as distinct from any particular individual are affected. When the interests of an individual, as distinct from other members of the community, are directly affected—e.g., where he is the owner of the particular property which is the *res* of the administrative action—a personal notice

<sup>30</sup> 157 L. T. R. at 119.

should be given. On the other hand, where the administrative action equally affects the members of a class—*e.g.*, all property owners within the locality—then constructive notice should be sufficient. This distinction would seem to be observed by the relevant English statutes. For example, under the Housing Act, 1936,<sup>31</sup> the local authority, before submitting a compulsory purchase order for confirmation to the Minister of Health, must (*a*) publish in one or more newspapers circulating in the district a notice stating the fact of the order having been made and describing the area comprised therein and naming a place where a copy of the order can be seen; and (*b*) serve on every owner, lessee, and occupier of any land to which the order relates a notice stating the effect of the order and that it is about to be submitted to the Minister for confirmation and specifying the time within and the manner in which objections thereto can be made. In other words, those whose property is directly affected are given personal notice, while the remainder of the locality is notified by publication. In addition, it has been the practice of the Ministry to keep interested professional associations, such as the Surveyors' Institution, informed about various housing schemes in process of preparation, and these organizations in turn inform their members through their publications.<sup>32</sup>

The closest English analogue to the methods of formal administrative adjudication in this country is, as we shall see, the system of public local inquiries, exemplified by those under the housing acts. The steps taken by the relevant Ministry to bring to the notice of those concerned the fact that a local inquiry is about to be held are not nearly as formalized as the notice practices of American administrative agencies. A large number of the local inquiries held by the Ministry of Health, for example, are advertised only by poster.<sup>33</sup> These are posted by the local

<sup>31</sup> 26 Geo. V & 1 Edw. VIII, c. 51, Sched. 1.

<sup>32</sup> Minutes of Evidence, 119.

<sup>33</sup> *Id.* at 202. Ministry of Health memorandum.

authority at the churches and chapels and in other places where public notices are usually posted in the district. When the subject matter of the inquiry is of such a character that great public interest is likely to be aroused, the Ministry may require the local authority, in addition to posting notices, to advertise the inquiry in the local press. Such advertisement has been made the rule for the more important types of inquiries, among which are included those arising under the housing acts. This seems to be an adequate, practical way of dealing with the notice problem in these cases, and if it does not seem sufficient by American standards we must bear in mind the differences in character in the types of hearing in the two countries. The usual American administrative hearing more nearly approaches that dealt with by the judicial process, and consequently requires a more formalized notice procedure. If the English procedure is, perhaps, not formal enough, it must at least be said in its favor that it eliminates the possibility of going to the other extreme, as the Supreme Court did, for instance, in the *Gratz* case.<sup>34</sup>

The right to be heard is, as we have indicated, the fundamental principle upon which the administration of justice in the common-law world is based. "No party ought to have his case decided without being afforded an opportunity of hearing the case which he has to meet as well as stating his own case. 'Even God himself did not pass sentence on Adam before he was called upon to make his defence. "Adam," says God, "where art thou? Hast thou not eaten of the tree that thou shouldst not eat?"' "<sup>35</sup> The applicable rule is aptly stated by Kelly, C.B., in *Wood v. Woad*,<sup>36</sup> where, speaking of the committee of a mutual insurance society, the Chief Baron says, in language which is applicable as well to administrative tribunals: "They are bound in the exercise of their functions by the rule expressed in the maxim 'Audi

<sup>34</sup> Federal Trade Commission v. Gratz, 253 U. S. 421 (1920).

<sup>35</sup> Wade and Phillips, Constitutional Law (3d ed. 1946) 276.

<sup>36</sup> (1874), L. R. 9 Ex. 190, 196.

alteram partem', that no man should be condemned to consequences resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

The right to a hearing, being an essential element of "natural justice," is no less a requirement of English administrative procedure than it is under the due-process concept in this country.<sup>37</sup> Thus, Lord Esher, M.R., in holding invalid the demolition by a local authority of a building erected in contravention of its bylaws without giving the owner an opportunity of showing cause why it should not be pulled down, stated that "the power which the local board exercised to enter on the property of the plaintiffs and pull down the building is a highly penal one. Those who exercise such a power are bound to act strictly within it. . . . where there is a power to enter and pull down buildings which have been erected in contravention of by-laws, it would be contrary to fundamental justice to allow that course to be taken without giving the owner notice and an opportunity to show cause."<sup>38</sup> The powers granted to the local authority "are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without his having an opportunity of being heard."<sup>39</sup>

*Rex v. Housing Appeal Tribunal*,<sup>40</sup> which is perhaps the leading English case, well illustrates both the rule and the need for judicial control to ensure conformity to the rule. Under the

<sup>37</sup> Cf. *Mr. Justice Holmes in Bi-Metallic Investment Co. v. State Board*, 239 U. S. 441, 445 (1915).

<sup>38</sup> *Hopkins v. Smethwick Local Board of Health* (1890), 24 Q. B. D. 712, 716.

<sup>39</sup> *Cooper v. Wandsworth Board of Works* (1863), 14 C. B. (N. S.) 180. Similar cases are *Urban Housing Co. v. Oxford C. C.*, [1939] 4 All E. R. 211; *Masters v. Pontypool Local Government Board* (1878), 9 Ch. D. 677; cf. *Attorney-General v. Hooper*, [1893] 3 Ch. 483.

<sup>40</sup> [1920] 3 K. B. 334.

Housing (Additional Powers) Act, 1919,<sup>41</sup> a local authority was empowered to prohibit building operations that interfered with the provision of dwelling houses, with the party prohibited being given a right of appeal to an Appeal Tribunal, constituted under the Act, subject to rules of procedure to be formulated by the Minister of Health. By Rule 7 of these rules as made, "if, after considering the notice of appeal and the statement of the local authority in reply and any further particulars which may be furnished by either party, the Appeal Tribunal are of opinion that the case is of such a nature that it can properly be determined without a hearing, they may dispense with a hearing, and may determine the appeal summarily." In the instant case, the Tribunal, having received the appellants' notice of appeal and the local authority's statement in reply, upon consideration of those two documents alone, without giving the appellants any opportunity of controverting the statements in the local authority's reply, dismissed the appeal.

The High Court quashed the decision of the Appeal Tribunal on the ground that the appellants had not been given an adequate hearing. "In my view," said Sankey, J., "it is a fundamental rule of law that no person can be deprived of his liberty or property without being heard or being given an opportunity to be heard, before the properly constituted tribunal."<sup>42</sup> Under the circumstances of this case, the required hearing was not afforded to the appellants, for they should have been afforded the opportunity to controvert the reply of the local authority. "On those documents as they stood there were a number of disputed questions of fact, and there the matter ended. No opportunity was given to the appellants to say whether they admitted those facts or had any explanation of them to offer . . . . It may well be that if the appellants had been given the opportunity they might have been able to disprove the statements of the local authority,

<sup>41</sup> 9 & 10 Geo. V, c. 99, § 5.

<sup>42</sup> [1920] 3 K. B. at 344.

and to show that their facts or inferences were wrong.”<sup>43</sup> Rule 7, under which the Appeal Tribunal proceeded, is interpreted to mean that the Tribunal may dispense with an oral hearing; but there must be a hearing, although not necessarily an oral one. The Earl of Reading, C.J., goes even further, asserting that “if r. 7 was intended to give the Appeal Tribunal the right to decide the matter not merely without an oral hearing but without allowing the appellants an opportunity of answering the case of their opponents, I think the Minister was exceeding his powers in making that rule, inasmuch as his powers are limited to making rules of procedure. Rules of procedure are the machinery for enforcing the right of appeal, and a rule which has the effect of taking that right away is not a rule of procedure.”<sup>44</sup>

It is important to note here that the decision quashed in this case was that of a known, specialized tribunal, and not the ordinary type of departmental decision by the Executive department as a whole. The Housing Appeal Tribunal was an independent body, composed of men well acquainted with the conditions pertaining to the markets for labor and materials requisite for building, and its chairman was a prominent barrister. Yet even such a responsible tribunal could ignore one of the elementary principles of justice. As expressed by one of the leading departmental witnesses before the Committee on Ministers' Powers: “It was a most unfortunate case because we requested an eminent K.C. to act as President of the Tribunal, and the first thing he did was to decide a case without hearing both sides.”<sup>45</sup> The need for judicial review on procedural grounds in all cases would, therefore, seem to be clear. Even the most admirably composed administrative tribunal may err here, either through excess of zeal or through ignorance. It is true that “the problem of fairness in administration cannot be solved by judicial

<sup>43</sup> *Id.* at 347.

<sup>44</sup> *Id.* at 342.

<sup>45</sup> Sir Maurice L. Gwyer, Minutes of Evidence, 31.

review alone."<sup>46</sup> But control by the courts can correct obvious abuses, such as those in the *Housing Appeal Tribunal* case, and can ensure Executive conformity to at least minimum standards of fairness.

The principle of the *Housing Appeal Tribunal* case has been generally followed by the courts, so that the right to be heard is as fundamental a part of English administrative law as it is of administrative law in this country.<sup>47</sup> Theoretically speaking, of course, this is not strictly accurate, for Parliament can abrogate even this essential right. In practice, however, except for emergency situations, Parliament will never do away with the right of hearing, and the judiciary will be most reluctant to read any but the most express legislative command as eliminating what is conceived of as a vital element of "natural justice."

The judicial attitude on this is shown by *Stafford v. Minister of Health*.<sup>48</sup> The system of public local inquiries, which we shall shortly have occasion to go into in some detail, is, as has been indicated, the English counterpart of the formal administrative hearing in this country, for these inquiries afford to the parties affected by Executive action about the only opportunity available of ventilating their grievances against such action. Such inquiries are required prior to the confirmation of a compulsory purchase order by the Minister of Health under the 1936 Housing Act, but by Section 2 of the Housing (Temporary Provisions) Act, 1944,<sup>49</sup> a temporary measure caused by the war emergency, the Minister might dispense with the public local inquiry at his discretion. In the *Stafford* case, the applicant had sent a notice to the Minister objecting on several grounds to the taking proposed of the land.

<sup>46</sup> Report of the Attorney General's Committee, 78.

<sup>47</sup> On the right to be heard, see *De Verteuil v. Knaggs*, [1918] A. C. 557; *Rex v. Judge Amphlett*, [1915] 2 K. B. 223; *Rex v. Huntingdon Confirming Authority*, [1929] 1 K. B. 698; *Rex (Cairns) v. Local Government Board*, [1911] 2 I. R. 331, 342. Cf. *Fisher v. Jackson*, [1891] 2 Ch. 84; *Fredman v. Minister of Health* (1936), 154 L. T. R. 240.

<sup>48</sup> [1946] K. B. 621.

<sup>49</sup> 7 & 8 Geo. VI, c. 33.

He heard no more about the matter until he received a notice from the Minister that he had confirmed the order. The Minister had based his decision solely upon the applicant's notice of objection, and the local authority's reply thereto, without giving the applicant an opportunity to meet the authority's reply. Thus an adequate hearing was not afforded under the principle of the *Housing Appeal Tribunal* case. "On the one side," said Charles, J., "the Minister had simply the appellant's naked grounds of objection, and on the other the council's detailed answer raising matters—I assume by way of answer to the objections—which are patently controversial. That answer was never communicated to the appellant. The next thing that he heard in the matter was a notice that the order to which he had objected had been confirmed. Without delay he appealed to this court, his case, in short, being that he has not been heard; that, in accordance with the Act of 1936, he, within the prescribed time, submitted a notice and grounds of objection, that he has a great deal of evidence which he wishes to submit to the Minister and, which, he says, will show that the council's answer cannot be substantiated; that he has never had a chance of pointing that out; and that the Minister has, in fact, heard one side only . . . . Accordingly, I am bound to come to the conclusion that the Minister did not hear both sides before he confirmed the order."<sup>50</sup>

The confirmation order was consequently quashed. Nor did the power of the Minister to dispense with the public local inquiry under the 1944 Act affect the result. Although the Minister was relieved from the obligation to hold such inquiry, he still had to act in accordance with the principles of justice. "It is clear that under the Housing (Temporary Provisions) Act, 1944, there is absolute discretion in the Minister whether to hold a public inquiry or not. The appellant has, however, the inalienable right of every citizen to have his case considered before the adjudicating authority comes to a decision. He has not

<sup>50</sup> [1946] K. B. at 624.



had that advantage . . . . That being my view, the order as confirmed is bad and must be quashed." <sup>51</sup>

It is not enough, however, merely to give to those affected the opportunity of being heard. The rules of "natural justice" require the observance of certain procedural essentials in the conduct of the hearing. "There are certain criteria of fairness in the hearing process which, in the absence of clear inapplicability in particular circumstances, should regularly be observed. Before adverse action is to be taken by any agency, . . . the individual immediately concerned should be apprised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be apprised of the evidence and contentions brought forward against him so that he may meet them. He must be offered a forum which provides him with an opportunity to bring his own contentions home to those who will adjudicate the controversy in which he is concerned. The forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy." <sup>52</sup>

An administrative hearing not conducted in conformity to these "fundamentals of fair play" would clearly be invalid in this country on constitutional grounds. Our courts have always intervened to ensure that administrative procedure has not been such as to deprive the individual of due process. "This court," said Mr. Justice Harlan, "has never held, nor must we now be understood as holding, that administrative officers . . . may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that

<sup>51</sup> *Id.* at 625. But cf. *Miller v. Minister of Health*, [1946] K. B. 626, where the *Stafford* case is distinguished on the facts.

<sup>52</sup> Report of the Attorney General's Committee, 62.

liberty depends." True it is that the hearing need not necessarily be "according to the forms of judicial procedure." But the administrative procedure must conform to the essentials of a fair hearing, else the decision is arbitrary and unreasonable. "No such arbitrary power can exist where the principles involved in due process of law are recognized."<sup>53</sup>

✓ The English courts, not having any constitutional requirements upon which to base their decisions, have tended to proceed more slowly in holding the process of administrative decision to certain minimal standards. The earlier view, indeed, was that it was not for the courts to examine into the conduct of the hearing at all, it being enough that the individual was afforded an opportunity to be heard. Thus, Section 299 of the Public Health Act, 1875,<sup>54</sup> empowered the Local Government Board to enforce the performance of its duty to provide sufficient sewers by a defaulting local authority, where the Board was satisfied, after due inquiry that the authority had been guilty of the alleged default. In *Reg. v. Staines Union*,<sup>55</sup> the defaulting authority, which was being proceeded against by way of mandamus, contended that the Board had not in fact held the "due inquiry" required by the Act, for the hearing officer had refused to allow certain material evidence tendered by the authority. The court, however, rejected this contention, Cave, J., stating: "I have very grave doubt whether we have anything to do with the question of due inquiry. The Local Government Board—and not this court—had to decide. They had to be satisfied, and though no doubt, they were to be satisfied after 'due inquiry', these words did not mean that the Queen's Bench Division had to exercise its ordinary jurisdiction, or rather an appeal jurisdiction, on what was 'due inquiry'. I have always protested against the attempt of the courts to take part in jurisdiction which they had nothing whatever to do with.

<sup>53</sup> *Yamataya v. Fisher*, 189 U. S. 86, 100 (1903).

<sup>54</sup> 38 & 39 Vict., c. 55.

<sup>55</sup> (1893), 69 L. T. R. 714.

So long as the question is one of law it is quite proper that the courts should pronounce an opinion; but what we are now asked to do is to see whether there has been any inquiry in point of law. If it could be shown that there was no inquiry at all, there might be some ground for refusing this application for *mandamus*. But it was admitted that there had been an inquiry, and an inquiry which had satisfied the Local Government Board."<sup>56</sup>

In the light of the later English cases, this language would seem to go too far. The requirement of a hearing, which even Cave, J., admitted the Local Government Board had to conform to, is of little value unless it proceeds with the "substance of a judicial proceeding";<sup>57</sup> *i.e.*, in accordance with the principles of "natural justice." If, as Professor Laski has insisted, "executive discretion is an impossible rule unless it is conceived of in terms of judicial standards,"<sup>58</sup> the courts must clearly have the authority to ensure compliance with such standards. "The judiciary should have such power of scrutiny as will enable it to see that the rules adopted by the executive are such as are likely to result in justice."<sup>59</sup>

The need for judicial control over the conduct of administrative hearings becomes evident upon consideration of the method of decision of the English administrative process. The statute may, of course, provide for decision by a known, specialized tribunal, in which case the process of decision is more or less judicialized, in that it roughly corresponds to that of the ordinary courts. In the normal case, however, the power to determine private rights and obligations<sup>60</sup> is vested in the Executive department as a whole. The decision rendered is an institutional one,

<sup>56</sup> *Id.* at 716.

<sup>57</sup> Field, J., in *Parsons v. Lakenheath School Board* (1889), 58 L. J. Q. B. 371, 372.

<sup>58</sup> Laski, *A Grammar of Politics* (4th ed. 1938) 301.

<sup>59</sup> *Ibid.*

<sup>60</sup> *I.e.*, the distinguishing feature of an administrative agency according to the Report of the Attorney General's Committee, 7.

in the sense that it is the decision of the department as a whole rather than that of any known individual or tribunal. "It is the combined wisdom of the department as a whole which is the tribunal."<sup>61</sup> Yet it is obvious that there must be some procedure by which the departmental entity obtains the necessary information upon which to base its decision. In addition, the individuals affected must be given some opportunity of stating their case. In this country, these functions are largely performed by administrative hearings before hearing officers designated by the agency concerned. The English counterpart of this type of administrative hearing is the public local inquiry.

These public local inquiries, which in general afford the individual the only hearing available to him, have been described by Sir Cecil Carr as somewhat resembling coroners' inquests, "which, while reaching a definite or indefinite finding of fact, perform the useful social function of ventilating local opinions and averting any impression that vital matters have been ignored or suppressed."<sup>62</sup> They are widespread in English administrative law. In a large number of cases, the Minister is required to hold such inquiry by statute before taking action. The best known of these, as most of the cases have dealt with them, are the inquiries held in connection with housing schemes by the Minister of Health. Such inquiries must be held prior to the confirmation of a compulsory purchase or slum-clearance order, if there are any objections to such order.<sup>63</sup> The tendency has been to extend the public-local-inquiry procedure as a statutory condition precedent to the administrative decision, and the Housing Act practice has been adopted in many subsequent statutes, where the Executive action has been similar in character.<sup>64</sup>

<sup>61</sup> Sir Maurice L. Gwyer, *Minutes of Evidence*, 30.

<sup>62</sup> *Concerning English Administrative Law* (1941) 111.

<sup>63</sup> Housing Act, 1930, 20 & 21 Geo. V, c. 39, Sched. 2; Housing Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 51, Schedules 1 & 3.

<sup>64</sup> *E.g.*, Local Government Act, 1933, 23 & 24 Geo. V, c. 51, § 160; Water Supplies (Exceptional Shortage Orders) Act, 1934, 24 & 25 Geo. V, c. 20, Sched.

These inquiries are conducted in the locality concerned by inspectors of the Ministry, who are thus roughly analogous to the examiners appointed under Section 11 of the Federal Administrative Procedure Act. These inspectors, generally speaking, are not people who have had any legal training. They are experts in the particular line that is the subject of the inquiry—*e.g.*, architects, civil engineers, surveyors, and the like<sup>65</sup>—rather than trained lawyers, thus differing greatly from the American hearing officer who almost always has some legal background. Dr. Allen's characterization of the housing-inquiry inspector—"nor is he, as a rule, a very highly qualified person in any respect; he may be a retired surveyor, engineer or architect, or more often one who, not being very successful in his own profession, is content to accept the security and comparatively small rewards of a permanent Civil Service appointment"<sup>66</sup>—probably goes too far.<sup>67</sup> But it indicates that the problem of personnel—the need for hearing officers of adequate education and experience, which the Attorney General's Committee described as "the heart of formal administrative adjudication"<sup>68</sup>—has been no less pressing in English administration than it has been on this side of the Atlantic.

Just as is the case with American administrative hearings, the nature of the English public local inquiry depends upon the

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1; Special Areas (Development and Improvement) Act, 1935, 25 & 26 Geo. V, c. 1, Sched. 3; Air Navigation Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 44, Sched. 1; Education Act, 1944, 7 & 8 Geo. VI, c. 31, § 90; Distribution of Industry Act, 1945, 8 & 9 Geo. VI, c. 36, § 12; Water Act, 1945, 8 & 9 Geo. VI, c. 42, Sched. 2; Statutory Orders (Special Procedure) Act, 1945, 9 & 10 Geo. VI, c. 18, Sched. 1; Trunk Roads Act, 1946, 9 & 10 Geo. VI, c. 30, Sched. 2; Acquisition of Land (Authorisation Procedure) Act, 1946, 9 & 10 Geo. VI, c. 49, Sched. 1; New Towns Act, 1946, 9 & 10 Geo. VI, c. 68; Agriculture Act, 1947, 10 & 11 Geo. VI, c. 48, § 92; Town and Country Planning Act, 1947, 10 & 11 Geo. VI, c. 51, § 41; Gas Act, 1948, 11 & 12 Geo. VI, c. 67, § 11.

<sup>65</sup> Sir Arthur Robinson, Minutes of Evidence, 159.

<sup>66</sup> Law and Orders (1945) 149.

<sup>67</sup> See, *e.g.*, evidence of G. Eve, Minutes of Evidence, 108.

<sup>68</sup> Report of the Attorney General's Committee, 46.

particular subject matter. "These inquiries, held under different statutes, may vary from small-scale meetings in the waiting room of a wayside railway station to full-dress assemblies in a big town hall with rows of barristers representing different interests."<sup>69</sup> The ordinary case is without counsel, and the procedure is quite informal, the interested parties simply being allowed to state their case and to controvert that of their opponents. The procedure tends to get more formal as the case becomes more important, until, in the case of a large housing scheme or a proposed borough extension, it approaches that of a judicial tribunal. There is an imposing array of K.C.'s on either side, witnesses are examined and cross-examined in detail before a large audience, and the atmosphere approximates that of a courtroom. In such a case, as the Chief Engineering Inspector of the Ministry of Health pointed out to the Donoughmore Committee, one is forced into being more formal than in the ordinary type of inquiry.<sup>70</sup> The actual procedure at the inquiry is regulated by the inspector who "has been given a common-sense code of general instructions telling him how he is to conduct the proceedings,"<sup>71</sup> so that, although he may not be specially qualified as a "lawyer, he has at least been made acquainted with the fundamentals of adversary procedure. At the close of the inquiry, the inspector usually makes a personal survey of the *res* of the proceeding—e.g., the slum-clearance area involved in a housing scheme—in order to inform himself of its geographical and technical features.

The public proceedings are completed with the holding of the inquiry. The subsequent stages in the process of decision are wholly matters of internal administration, for there are no statutory requirements to which the Executive practice must

<sup>69</sup> Carr, *op. cit.* *supra* note 62, at 111.

<sup>70</sup> Minutes of Evidence, 190.

<sup>71</sup> Carr, *op. cit.* *supra* note 62, at 114. The instructions of the Ministry of Health for the guidance of their inspectors are set forth in Minutes of Evidence, 168.

conform. The next step after the inquiry is for the inspector to submit a report in writing to the department, containing a summary of the evidence and issues and his recommendations, for the relevant statutes normally provide that the decision of the Minister is to be given after the consideration of the report of the person who held the inquiry.<sup>72</sup> But though the statutes provide that it is the Minister who is to decide, the decision is not his in a literal sense. The decision is, in fact, made by some official in the department, his rank depending upon the importance of the case, and except where wide questions of policy are involved the Minister himself has like as not never heard of the matter. The report of the inspector is generally circulated among the various branches of the department, who deal with the special points in which they are competent. Thus, if an issue of law arises, it is referred to the legal branch, or a medical question to the medical branch. The final decision is the result of this co-operative process within the Ministry. As far as the individual affected is concerned, however, the curtain comes down when the local inquiry is closed. He has seen neither the inspector's report nor the departmental comment upon it. The final decision is based upon all of this material, but all of it is treated as confidential matter. Nobody knows what the inspector reported, and how far his recommendations were followed, or what, indeed, was the basis for the Minister's decision.

It seems obvious even from this cursory survey that, from a strictly legal point of view, there are grave defects in this procedure. "Without straining your powers of imagination," said a member of the Committee on Ministers' Powers, after this procedure had been described, "may I translate that into a contest between two people at law. Two people are having a contest at law. It is referred to the Law Courts, the Law Courts send down a representative to hear the evidence, he goes down, he takes the evidence unsworn, he comes back, writes a report

<sup>72</sup> *R.g.*, Housing Act, 1936, Schedules. 1 & 3.

to put to the Judge, which is not seen by the parties, it is merely advisory. That is commented upon by somebody else in the Courts. It goes to another part of the Courts where it is also discussed. An official, an unknown official in the Courts<sup>73</sup> gives a judgment in writing. Can you conceive of that satisfying anybody connected with the case at all?"<sup>73</sup>

One must admit that this comment is not wholly fair, for the comparison with the courts is not an entirely accurate one. The differences in origin and function of courts and administrative agencies preclude the wholesale transplantation of the rules of procedure which have evolved from the history and experience of courts.<sup>74</sup> "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes."<sup>75</sup> To impose the details of judicial procedure upon Executive agencies would only impede effective administration. "The full utilization of concentrated experience may be frustrated if administrative hearing procedure must be shaped to an inflexible pattern which has been evolved with an eye to the frailties of inexperienced jurors."<sup>76</sup> Some leeway must, therefore, be given to the administrative process in formulating its own procedure. This was recognized at an early time by Anglo-American courts. "The inquiry of a board of the character of the Interstate Commerce Commission," declared the Supreme Court in 1904, "should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law."<sup>77</sup>

But though the procedure of the administrative process may

<sup>73</sup> Sir John Withers, *Minutes of Evidence*, 200.

<sup>74</sup> *Mt. Justice Frankfurter in Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143 (1940).

<sup>75</sup> Landis, *The Administrative Process* (1938) 46.

<sup>76</sup> Report of the Attorney General's Committee, 61.

<sup>77</sup> *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44 (1904).



be more elastic than that of the courts, still the fundamental principles of justice must be observed. Administrative justice must conform to "judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."<sup>78</sup> The rule in England is well stated by Lord Loreburn, L.C., in the first important case before the House of Lords on the exercise of judicial power by an Executive department. "Comparatively recent statutes," he says, "have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."<sup>79</sup>

The process of decision in English administrative law, which has been described above, was put to the test of "natural justice" in the leading case of *Local Government Board v. Arlidge*.<sup>80</sup> That case arose under the Housing, Town Planning, &c., Act,

<sup>78</sup> *Morgan v. United States*, 304 U. S. 1, 19 (1938).

<sup>79</sup> *Board of Education v. Rice*, [1911] A. C. 179, 182.

<sup>80</sup> [1915] A. C. 120.

1909,<sup>81</sup> which provided for appeals to the Local Government Board from orders of local authorities closing a dwelling house as unfit for human habitation. The procedure on such appeals was to be such as the Local Government Board by rules determined, but the rules were to provide that the Board should not dismiss an appeal without holding a public local inquiry. In the instant case, the Board, after having held the required inquiry, dismissed the appeal of the houseowner. The latter then applied to the courts to quash the decision of the Board, claiming that it was contrary to "natural justice" on the grounds that (1) the order of the Board did not disclose by which officer of the Board the appeal had been decided; (2) he was entitled to be heard orally by the deciding officer; and (3) he was entitled to see the report of the inspector who had conducted the public local inquiry on behalf of the Board.

The House of Lords rejected the claim of the houseowner, and, "so far from disapproving the procedure adopted by the department, regarded it as complying with all the essentials of justice and as having done complete justice to Mr. Arlidge."<sup>82</sup> The Lord Chancellor, Lord Haldane, adverted to the tendency to entrust appeal functions such as that in this case to Executive departments. "Such a body as the Local Government Board has the duty of enforcing obligations upon the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."<sup>83</sup>

The decision in such cases must, of necessity, be that of the

<sup>81</sup> 9 Edw. VII, c. 44, §§ 17, 39.

<sup>82</sup> Carr, *op. cit. supra* note 62, at 115.

<sup>83</sup> [1915] A. C. at 132.

department as a whole, rather than that of any known official or tribunal. Delegation by the head of the department in whose name the decision is made is necessary to enable the department to perform its duties. "The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it."<sup>84</sup> Lord Shaw goes even further, referring to the desire of the houseowner "to ascertain which, in this great department of State, were the actual mind or minds which judged his case" as a "grotesque demand to individualise the department for private purposes." "In my opinion, this demand is unjustifiable. It is not supported by statute, it would be inconsistent with past administrative practice, and it would not tend to, but might seriously impair, administrative efficiency."<sup>85</sup>

The type of vicarious decision permitted by the House of Lords in the *Arlidge* case was disapproved of in strong language by the United States Supreme Court in the first *Morgan* case.<sup>86</sup> There, too, as in the English case, the enabling legislation required a quasi-judicial decision to be made by the administrative agency concerned—in that case, the Secretary of Agriculture—

<sup>84</sup> *Id.* at 133.

<sup>85</sup> *Id.* at 135-36.

<sup>86</sup> *Morgan v. United States*, 298 U. S. 468 (1936).

after a public hearing. Although the order was formally made by the Secretary, after a hearing before an examiner and argument upon the evidence before another departmental official, it was claimed that he "had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding and had not heard or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or of any of their representatives."<sup>87</sup> Or, in other words, that although the order was ostensibly made by the Secretary the actual deciding function was performed by someone else in the department. The Court held that this did not meet the statutory requirement of a "full hearing." "The requirement of a 'full hearing,'" the opinion states, in language almost diametrically opposed to the famous passage of Lord Shaw in the *Arlidge* case,<sup>88</sup> "has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts. . . . The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."<sup>89</sup> The official who formally decides must have addressed himself to the evidence and have conscientiously reached the conclusions that he deems it to justify. "That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."<sup>90</sup>

That there are practical difficulties in the literal application of the "one-who-decides-must-hear" principle to administrative

<sup>87</sup> *Id.* at 476.

<sup>88</sup> [1915] A. C. at 138.

<sup>89</sup> 298 U. S. at 480.

<sup>90</sup> *Id.* at 481.

agencies seems obvious when one considers the great volume and complexity of the matters dealt with by these agencies. The agency head, whether a single individual, as in England, or a board, as is the more usual in this country, could not possibly dispose of them unaided in the sense in which a court judges the cases that come before it. The device used in both countries is for the administrative hearings to be conducted by subordinate officials, with the actual process of decision taking place elsewhere in the agency. This device, however, when carried to the extent it has been in England under the principle of the *Arledge* case, may cause private parties to lose faith in the justice of administrative decisions. "How is it to be expected that a party against whom a decision has been given in a hole-and-corner fashion . . . should believe that he has had justice?"<sup>91</sup> Departmental decisions, with the hearing conducted by one official and the actual decision made by another, violate the right of the litigant to have his case decided by the one who has heard the evidence. As the conduct of an administrative hearing "becomes divorced from responsibility for decision two undesirable consequences ensue. The hearing itself degenerates and the decision becomes anonymous."<sup>92</sup> That this is not conducive to public confidence in administrative justice is shown by the many criticisms which have been directed against the process of administrative decision on both sides of the Atlantic. As Dean Landis has succinctly put it, if one coming before an administrative tribunal does not know who is going to decide his case, "and if he has his suspicion that it is going to be decided by some two-pence-halfpenny law clerk down the line, you will never get anywhere, in my judgment, with bringing into existence a feeling that justice is being done."<sup>93</sup>

<sup>91</sup> Hewart, *The New Despotism* (1929) 48.

<sup>92</sup> Report of the Attorney General's Committee, 45. Cf. Memorandum of E. A. Mitchell-Innes, representing the General Council of the Bar, Minutes of Evidence, 171.

<sup>93</sup> In "Symposium on Administrative Law" 9 *Am. L. School Rev.* 139, 182 (1939).

"The great objection to a purely Departmental decision is that nobody knows how it is arrived at."<sup>94</sup> To take the normal type of administrative decision in England: The individual affected is, it is true, granted a hearing before a subordinate official of the Ministry. But the decision takes place in the recesses of the department, and the private individual hears no more of the case until the decision is forwarded to him in the name of the Minister. "I am directed by the Minister to state," he is told by some civil servant in the department, "that he has carefully considered the report of his inspector," and so on, and "for the foregoing reasons the Minister has decided to dismiss [or allow] the appeal," when, in all probability, the Minister has never even heard of the matter. It is impossible to say who made the actual decision—what official in the department directed his mind to the evidence and argument and drew therefrom the final conclusion. What happens in practice is for the report of the inspector to be circulated among the various branches of the Ministry, until the decision is actually made by some person in the departmental hierarchy, his status depending upon the importance of the subject matter. The inspector produces his report to his superior officer, and the latter, in Sir Roger Gregory's phrase, produces it to a bigger flea, and so *ad infinitum*. Ultimately it gets the seal of the Minister and is signed by an assistant secretary.<sup>95</sup>

It was of this type of decision that Mr. Justice Eve once remarked: "A late Lord Justice—one of great learning and wide experience—Lord Justice Farwell—once stated that he could not trust the whole bench of bishops to do justice under such conditions. With a respect for the episcopate as profound as that of the Lord Justice I entirely adopt his language. I share to the full his distrust of justice administered by a tribunal . . . unassisted and untrammelled by the salutary rules regulating procedure and

<sup>94</sup> Allen, *op. cit.* *supra* note 66, at 165.

<sup>95</sup> Minutes of Evidence, 97.

the admission of evidence in these courts, uncontrolled by the invigorating and corrective criticism provoked and stimulated by publicity, and finally wrapping up its findings in a secret communication to the department which appointed it."<sup>96</sup>

It is not surprising, therefore, that strong criticisms have been directed against the process of departmental decisions. The decision of his case by a known tribunal before whom one can state his case and meet the contentions of his opponents is vital to the fostering of a belief that justice is being done. "You must satisfy that requirement of the individual who comes before an administrative tribunal, that feeling that he wants to talk to the man who is going to decide that case."<sup>97</sup> The decision by a vast departmental anonymity falls far short of satisfying that feeling. "I venture to say," asserted Dr. Robson before the Committee on Ministers' Powers, "that everybody knows there is a difference between seeing your appointed tribunal and merely having a letter from the Minister saying that he has taken into consideration your representation and 'I am directed to inform you that the Minister has decided so-and-so.' You do not know who has decided. You imagine the papers have been handed round the Department and that some underling has done it. There is a very large institutional and psychological difference between that and having a definite Tribunal. The parties would see the Tribunal, they would also have an opportunity of knowing what was said against them; and, what I regard as fundamental, they would know the grounds for the decision after it has been made."<sup>98</sup>

American attempts to deal with this problem are most suggestive here. The Federal Administrative Procedure Act attempts a partial solution by assimilating the roles of hearing and deciding officials within the administrative agency to those of trial and

<sup>96</sup> *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. 276, 293.

<sup>97</sup> Landis, *supra* note 93, at 182.

<sup>98</sup> Minutes of Evidence, 66.

appellate courts. Section 8 (a) provides that, in cases other than those in which the agency itself has conducted the initial hearing or where the agency requires the certification of the entire record to itself for initial decision, the officer who presided at the hearing shall initially decide the case. "Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency." A procedure such as this gives greater weight to the position of the hearing officer. It recognizes that, as the one who has received the evidence and heard the witnesses and arguments, he is best qualified to make at least a tentative decision. It elevates him from the role of adviser to that of judge.<sup>99</sup>

The position of the hearing officer in English administrative law—*i.e.*, of the inspector at the public local inquiry—seems to be a most unfortunate one from the point of view of ensuring public confidence in administrative justice. His role is simply that of a monitor at the hearing, with authority to keep order and supervise the taking of testimony. He serves as the medium of transmission from the private individual to the ultimate judge, but he has little or no power to play a real part in the final decision of the case. The inspector at such inquiries, said Buckley, L.J., "is not within the class of persons who can decide anything. His duty, in my opinion, is to hear the examination and cross-examination of the witnesses and to record it and transmit it to the Board with whom it lies to determine the result. He may also, I think, and certainly it has long been the custom that he should, make a report. This, I take it, will assume the form of a critical examination of the evidence adduced before him and an expression of his opinion upon the questions of fact as

<sup>99</sup> This is true, of course, only where the agency does not itself conduct the initial hearing or require the certification of the entire record to itself for initial decision.



appearing upon it."<sup>100</sup> The lack of real power in the English hearing officer, as compared with his American counterpart under the Administrative Procedure Act, is well shown by *Rex v. Hudson*,<sup>101</sup> where the court held that such an official had no jurisdiction to rule on the question of the *vires* of the proposed Executive action into which he was inquiring. His duty was to inquire into the facts and to report thereon, and it was not for him to deal with the question of *ultra vires* other than as a conduit for the transmission of legal arguments to the department.<sup>102</sup>

The relatively subordinate position of the English hearing officer cannot fail to have a deleterious effect both upon public confidence and the justness of the decisions themselves. Parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to the officer who must in the first instance decide.<sup>103</sup> They are not likely to be satisfied where their only hearing is before a minor official, who has little to do with the final determination. The type of procedure prescribed under the American act would do much to meet these defects. It is true that such a procedure would prove unworkable with the type of hearing officer most English departments use at present. The hearing officer, under a system where he may be called upon to make the initial decision, must have legal as well as technical qualifications. The engineer-inspector, fortified with a common-sense code of procedure, is not competent to make such decisions. But mere legal qualifications are also not enough. "What is really needed," as Dr. Robson points out, "is a combination of legal training with special experience or training in the particular field in which the jurisdiction is to be exercised . . . . The administrative judiciary of the future

<sup>100</sup> *Rex v. Local Government Board*, [1914] 1 K. B. 160, 186. The position of the inspector is well described by Swift, J., in *Marriott v. Minister of Health* (1936), 154 L. T. R. 47, 49.

<sup>101</sup> [1915] 1 K. B. 838.

<sup>102</sup> Cf. *In re An Application by Beck and Pollitzer*, [1948] 2 K. B. 339.

<sup>103</sup> Report of the Attorney General's Committee, 46.

should consist of youngish men who have had a training in law, who have taken a law degree, or been called to the bar and perhaps practised a little, and who have also a knowledge of the social sciences such as economics, government, public health, business administration, or educational science."<sup>104</sup>

With proper personnel, a procedure such as that provided for in the American act can do much to improve the method of administrative decision. It would allow the hearing officer to play a vital part in the process of departmental decision, recognizing the truth in Mr. Justice Brandeis' dictum that responsibility is the great developer of men.<sup>105</sup> "If the initial decision—which may dispose of the case or be the statement of it from which appeal may be taken to the [agency] heads—can carry a hallmark of fairness and capacity, a great part of the criticisms of administrative agencies will have been met."<sup>106</sup>

The use of a procedure such as that under the American act—*i.e.*, one in which the initial decision may be made by the hearing inspector subject to an appeal to the Minister—would also require a different resolution of the two other points at issue in the *Arlidge* case; namely, the right to be heard orally before the ultimate deciding official, and the right to disclosure of inspectors' reports. The right to appeal from the hearing officer implies both oral argument and the ability to dispute the contentions in his initial decision. With regard to the first of these points, the House of Lords was most emphatic in denying that the right to be heard orally before the decider was an essential element of "natural justice." "Can it be said," asks Lord Parmoor, "that in a case in which the statute gives the right to a public local inquiry, and in which the statutory rules of procedure do not provide for oral testimony before the Local Government Board, the mere refusal to hear such oral testimony amounts to a denial

<sup>104</sup> Justice and Administrative Law (2d ed. 1947) 479.

<sup>105</sup> *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 92 (1936).

<sup>106</sup> Report of the Attorney General's Committee, 43.

of the principles of substantial justice?"<sup>107</sup> Few have ventured to dispute this feature of the *Arlidge* decision. Thus, the Committee on Ministers' Powers, in its enunciation of the rules of "natural justice," states that though the right to be heard is a fundamental element of that concept there is "no natural right to an oral hearing."<sup>108</sup>

That oral argument in every case before an administrative agency might serve unduly to impede the administrative determination of disputes seems obvious. It was this which led the Attorney General's Committee to assert that "expedition and simplification of formal administrative proceedings can further be achieved by substitution, in appropriate situations of written evidence for oral evidence."<sup>109</sup> The "shortened procedure" used in certain cases by the United States Department of Agriculture and the Interstate Commerce Commission, under which the case is decided upon written evidence and argument, is pointed to as a practical example of what can be accomplished in this direction. It is to be noted, however, that this type of procedure is used only if the parties consent, and this is quite another thing from saying, as the House of Lords did in the *Arlidge* case, that an oral hearing could be denied where the individual wanted it. The right to insist on an oral hearing—the ability to confront the decider face to face—is an important element in building up public confidence in administrative justice. "In my judgment," Buckley, L.J., asserted in the Court of Appeal in the *Arlidge* case, "it would as a matter of public policy be very inexpedient for a department of the Government in whom powers such as these are vested by statute to refuse an appellant an oral hearing if he requests it. It is not expedient that a party should be sent away with a grievance. It is desirable that the decision of a Government department equally with that of a Court of justice

<sup>107</sup> [1915] A. C. at 145.

<sup>108</sup> Report, 80.

<sup>109</sup> Report, 69.

should be arrived at and pronounced in full publicity and in such manner as to satisfy the public conscience that the case has been heard and a decision pronounced after full opportunity given to the party to make and sustain his case."<sup>110</sup> \*

Under a procedure where the administrative hearing is conducted by one agency official and the ultimate decision made by another, the problem naturally arises of how to convey the information acquired by the hearing officer to the one who decides. The usual method of transmission in this country from the hearing officer to the agency has been the employment of intermediate reports. Likewise, in England, as we have seen, the common device is through the use of a report from the inspector to the Ministry, with the important difference that such reports are made in the form of confidential documents. The nondisclosure of inspectors' reports was held not to violate the principles of "natural justice" in what is perhaps the most controversial part of the *Arlidge* decision. Referring to the claim of the private individual on this point, Lord Moulton said that "no such right is given by statute or by an established custom of the department. Like every administrative body, the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the department should be made public. It would, in my opinion, cripple the usefulness of these inquiries . . . . Such a practice would, in my opinion, be decidedly mischievous."<sup>111</sup>

The problem of inspectors' reports was one to which the Committee on Ministers' Powers devoted much attention. The opinion of the departmental witnesses before it was overwhelmingly against the publication of such reports.<sup>112</sup> It was said that the inspector could declare himself freely only if his report were confidential. A public report would be very much more color-

<sup>110</sup> [1914] 1 K. B. 160, 190.

<sup>111</sup> [1915] A. C. at 151.

<sup>112</sup> But see the testimony of Sir Maurice L. Gwyer, Minutes of Evidence, 22.

less; it would "fail to have that 'bite' to it that it would have otherwise."<sup>113</sup> Or, as expressed by Lord Shaw, "if it were laid down in Courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks."<sup>114</sup> But, as Dr. Allen has pointed out, these arguments might apply with equal force to any report whatever. "A judge could often give a very far from 'colourless' judgment if he allowed himself to comment at large on the elements which nearly always loom behind, though they do not actually appear in a lawsuit."<sup>115</sup>

Other than the claim of administrative convenience, there seems to be no valid reason why inspectors' reports should be treated as confidential documents. The type of inquiry provided for in the *Arlidge* case has been given a particular form and character by the legislature for the purpose, presumably, of satisfying those whose interests may be involved that all relevant facts and considerations will be put fairly and impartially before the Minister, so that he might arrive at a just decision. If the report giving the results of the inquiry passes into the department and is seen by no one but the Minister and his confidential advisers, doubt may well arise about whether a true picture has been conveyed to the Minister's mind.<sup>116</sup> "The very purpose is that the inquiry should be public, and how can that be when the result is private?"<sup>117</sup> The inspector may have drawn some erroneous conclusion, or even made some gross factual blunder—"supposing the Inspector . . . , and we know it may very well happen, had mistaken East for West"<sup>118</sup>—and an unjust de-

<sup>113</sup> R. G. Hetherington, *id.* at 196.

<sup>114</sup> [1915] A. C. at 137.

<sup>115</sup> Law and Orders (1945) 151.

<sup>116</sup> Report of the Committee on Ministers' Powers, 104.

<sup>117</sup> Buckley, L.J., in *Rex v. Local Government Board*, [1914] 1 K. B. 160, 187.

<sup>118</sup> Sir Roger Gregory, Minutes of Evidence, 188.

cision may very likely be the result because no opportunity is given to those affected to correct such mistakes. Then, too, from the point of view of the principles of justice, the mind of the Tribunal should not be swayed by statements which are not communicated to the parties, and with which they are given no opportunity to deal. In these cases, as Lord Hewart has pointed out, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly [seem] to be done."<sup>119</sup> The present situation, under which those affected can characterize the inspector as "a witness giving his evidence to the judge behind the backs of both parties, neither of whom knows what he has said,"<sup>120</sup> falls far short of this desideratum. Nondisclosure is still the common practice, although the Committee on Ministers' Powers, after careful consideration of the arguments for and against publication of inspectors' reports, concluded in favor of such publication,<sup>121</sup> even implying that nondisclosure in these circumstances was contrary to "natural justice."<sup>122</sup>

The problem of nondisclosure presented in the *Arlidge* case has not arisen in this country, for the common administrative practice here has been for copies of the hearing officer's report to be made available to the parties as soon as it is transmitted to the agency. The usage here, which is reaffirmed in Section 8 (b) of the Administrative Procedure Act, goes even further than the recommendations of the Donoughmore Committee on this score. In general, exceptions to the hearing officer's report and oral argument on the exceptions have been allowed by American administrative agencies. It was to avoid the possibility

<sup>119</sup> *Rex v. Sussex Justices*, [1924] 1 K. B. 256, 259. The original report reads "but should manifestly and undoubtedly be seen to be done," but, as pointed out by Avory, J., in *Rox v. Essex Justices*, [1927] 2 K. B. 475, 488, "the words 'be seen' must be a misprint for the word 'seem.'"

<sup>120</sup> Sir John Lorden, Minutes of Evidence, 69.

<sup>121</sup> Report, 105. Cf. *Margerison v. Hind & Co.*, [1922] 1 K. B. 214.

<sup>122</sup> Report, 80.

of such a "re-hearing by way of appeal of the questions upon which evidence was taken at the inquiry" that the British Committee limited its recommendation of publication of inspectors' reports to their communication with the Minister's decision to the parties concerned—a limitation which does away with much that is to be gained by publication.

The problem of nondisclosure has arisen in American administrative law at one step removed from the stage of administrative decision which was in issue in the *Arlidge* case. Because of the great volume and complexity of matters adjudicated by them, most of our agencies have been unable themselves to do the bulk of the work involved in the deciding function. They have had to rely upon review officers to digest the record and report of the hearing officer and to prepare draft findings and opinions. Because of the great weight ordinarily given by the agency to the conclusions of these review officers—they are the eyes and ears of the agency to an even greater extent than the hearing officer—the problem of disclosure of their reports and the opportunity to take exception thereto has been an acute one. "One can well understand that a busy board or commission ought not to be asked to read all of a mass of testimony running perhaps to thousands of pages. Appellate Courts very generally act upon abstracts of huge records. But there is a significant difference. The abstracts used in Court are made by the parties and contain what each party deems necessary or proper to present his side of the case. If the trial Judge deems more necessary he may have it included. The abstract then becomes part of the record and is open to use by both parties. On the other hand, the abstracts used by administrative agencies are not made by the parties, do not contain what the parties regard as needed to make out their contention and do not become part of the record."<sup>123</sup>

The judicial attitude on this point is shown by the language of

<sup>123</sup> Pound, *Administrative Law* (1942) 71.

Mr. Chief Justice Hughes in the second *Morgan* case,<sup>124</sup> which dealt with the adoption by the Secretary of Agriculture of proposed findings prepared by the branch of the department which had conducted the proceedings for the Government, with no opportunity having been given to the individuals affected to examine such findings until they were served with the order. "If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."<sup>125</sup> It is of interest to note here that Chief Justice Hughes uses the direct judicial analogy rejected so emphatically by Lord Shaw in the *Arlidge* case, for, with us, as has been indicated, the requirement of a full hearing "has obvious reference to the tradition of judicial proceedings."

The purpose of requiring the disclosure of the reports of its subordinates used by the administrative agency to aid it in the process of decision is to ensure just decisions by subjecting the administrative process to the light of public inquiry. Even more important in ensuring this result is the requirement of reasoned decisions. The value of reasoned opinions as a check upon arbitrary administrative power seems clear. "For, in the first place, the requirement of an opinion provides considerable assurance that the case will be thought through by the deciding authority. There is a salutary discipline in formulating reasons for results, a discipline wholly absent where there is freedom to announce

<sup>124</sup> *Morgan v. United States*, 304 U. S. 1 (1938).

<sup>125</sup> *Id.* at 19.



a naked conclusion. Error and carelessness may be squeezed out in the opinion-shaping process. Second, the exposure of reasoning to public scrutiny and criticism is healthy. An agency will benefit from having its decisions run a professional and academic gauntlet. Third, the parties to a proceeding will be better satisfied if they are enabled to know the bases of the decision affecting them. Often they may assign the most improbable reasons if told none. Finally, opinions enable the private interests concerned, and the bar that advises them, to obtain additional guidance for their future conduct. Even where strict adherence to precedent is not observed, some light—perhaps as much as the agency itself possesses—will be shed on future action.”<sup>126</sup>

Perhaps no other aspect of English administrative law strikes the American observer in so unfavorable a light as the failure to require reasons for administrative decisions. The communication of reasons is left entirely to the discretion of the Ministry concerned. “In actual practice, reasons for Departmental decisions are frequently given—but only *ex gratia*.”<sup>127</sup> This in spite of the fact that the Committee on Ministers’ Powers recommended that all administrative decisions should be in the form of reasoned documents available to the parties affected<sup>128</sup>—which led Dr. Allen to comment, with reference to the present practice, “I know of no more striking example of sheer tenacity to Departmental habits for their own sake.”<sup>129</sup>

The tendency in American administrative law, on the other hand, has been toward extending the requirement of reasoned decisions by administrative agencies. In addition to the considerations mentioned above, the vastly more important role played by judicial review in this country has made such decisions necessary if the reviewing court is to be enabled adequately to perform its functions. The Federal Administrative Procedure Act

<sup>126</sup> Report of the Attorney General’s Committee, 30.

<sup>127</sup> Allen, *op. cit. supra* note 66, at 167.

<sup>128</sup> Report, 100.

<sup>129</sup> *Op. cit. supra* note 66, at 167.

requires reasoned opinions in all administrative decisions. In so doing, it practically assimilates the type of opinion required to that normally issued by courts, Section 8 (b) requiring all administrative decisions to include a statement of "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record." This goes further even than the recommendations of the majority of the Attorney General's Committee along this line, but, though increasing the burden upon administrative agencies, it does much toward meeting some of the strongest criticisms directed against the administrative process.

The rule against bias is, in the opinion of the Donoughmore Committee, the first and most fundamental principle of "natural justice."<sup>130</sup> "My Lords," said Viscount Cave, L.C., in an important case, "if there is one principle which forms an integral part of English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others."<sup>131</sup> The most obvious type of bias is that arising from a pecuniary interest.<sup>132</sup> However, such cases are comparatively rare and one need not devote much attention to them. As to disqualifying interest other than pecuniary interest, the rule disqualifies any one exercising judicial power whenever there is a real likelihood

<sup>130</sup> Report, 76.

<sup>131</sup> *Frome United Breweries Co. v. Bath Justices*, [1926] A. C. 586, 590.

<sup>132</sup> *Dimes v. Grand Junction Canal* (1852), 3 H. L. C. 759; *Tumey v. Ohio*, 273 U. S. 510 (1927).

that he would be predisposed in favor of one of the parties.<sup>133</sup> The bias need not actually have influenced the decision one way or the other; "if there are circumstance so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists"<sup>134</sup>—"judges, like Caesar's wife, should be above suspicion."<sup>135</sup>

One of the outstanding features of American administrative agencies is the concentration in them of the functions of prosecutor and judge. This "blends within a single agency both the power to initiate complaints and the power to determine whether the alleged facts which give rise to the complaint exist to such a degree as to justify the imposition of a penalty."<sup>136</sup> In a sense, this violates the rule that a man may not be a judge in his own cause. "Of course," said Cotton, L.J., in *Leeson v. General Council of Medical Education*,<sup>137</sup> "the rule is very plain that no man can be plaintiff, or prosecutor, in any action, and at the same time sit in judgment to decide in that particular case—either in his own case, or in any case, where he brings forward the accusation or complaint on which the order is made." It is true that, as the majority of the Attorney General's Committee has pointed out, "an administrative agency is not one man or a few men but many. It is important . . . not to make the mistake of conceiving of an agency as a collective person and concluding that, because the agency initiates action and renders decision thereafter, the same person is doing both."<sup>138</sup> But, even with this caveat in mind, the dangers implicit in such concentration seem clear. "The liti-

<sup>133</sup> *Reg. v. Rand* (1866), L. R. 1 Q. B. 230, 233.

<sup>134</sup> *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. 276, 289.

<sup>135</sup> Bowen, L.J., in *Leeson v. General Council of Medical Education* (1889),

43 Ch. D. 366, 385.

<sup>136</sup> Landis, *The Administrative Process* (1938) 91.

<sup>137</sup> (1889), 43 Ch. D. 366, 379.

<sup>138</sup> Report, 55.

gant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportunity to argue his case to an unbiased official and that he has been deprived of safeguards he has been taught to revere."<sup>139</sup>

Much of the literature on administrative law in this country has been concerned with this problem of the concentration of functions in administrative agencies. A Government study earlier than that of the Attorney General's Committee proposed a complete and drastic program of separation of functions as a means of solution. Its proposal was that agencies with quasi-judicial functions should be divided into an administrative section and a judicial section, the former "to formulate rules, initiate action, investigate complaints . . . [to] do all the purely administrative or sub-legislative work now done by the commissions—in short, all the work which is not essentially judicial in nature," and the latter "to sit as an impartial, independent body to make decisions affecting the public interest and private rights."<sup>140</sup> This program for complete separation, with adjudication by wholly independent agencies, was endorsed by the minority of the Attorney General's Committee.<sup>141</sup> The majority, however, although recognizing that the commingling of functions of investigation or advocacy with the function of deciding was undesirable, nevertheless thought that the disadvantages of complete separation in decreased administrative efficiency and also in the "sheer multiplication of separate Governmental organizations"<sup>142</sup> more than counterbalanced the advantages claimed, especially as these latter could be secured just as adequately by a purely "internal" separation of functions, which would isolate those in the agency who are engaged in the adjudicating activity.

<sup>139</sup> *Id.* at 204.

<sup>140</sup> Report of the President's Committee on Administrative Management (1937)

41-42.

<sup>141</sup> Report, 206-9.

<sup>142</sup> *Id.* at 57. "If the proposal were rigorously carried out, two agencies would grow in each case where one grew before."

The Federal Administrative Procedure Act follows the majority in its attempt to deal with the problem of the concentration of functions. "Internal" separation is achieved by setting up within each agency a group of semi-independent hearing officers, called examiners, to whom alone are to be assigned the initial adjudicating functions of the agency. Such examiners are to "perform no duties inconsistent with their duties and responsibilities as examiners." To ensure equality of participation and to prevent attempts to reduce examiners who are in disfavor to inactivity, the agencies are required to assign examiners to cases in rotation so far as practicable. Until this Act, the hearing officers of our administrative agencies were appointed and removed solely at the discretion of the agency. They were, first of all, servants of the agency, dependent upon its favor for continued employment, and doubts were often expressed about their impartiality in cases in which the agency had an interest. The Administrative Procedure Act seeks to make examiners largely independent of the agency, Section 11 providing that they are to be removed by the agency only for good cause established and determined by the Civil Service Commission, after opportunity for hearing and upon the record thereof. Removal of examiners for not adhering to the agency viewpoint is thus effectively precluded.

A problem similar to the concentration of functions in American administrative agencies has arisen in England from the combination of functions in Agricultural Marketing Boards. These Boards are, as we have seen,<sup>143</sup> empowered to impose penalties upon producers contravening the provisions of the marketing schemes under which they operate. Under the system of industrial self-discipline which the marketing acts establish, it is the Boards themselves that investigate, bring charges, and impose penalties, if the charges are found to be valid. Strong criticisms have been directed against this arrangement, both on grounds of

<sup>143</sup> *Supra* p. 97.

general policy and with reference to the procedure of the Boards. The chief complaint has been that under the present system the Boards are in the position of prosecutor, jury, and judge in their own cause. The combination of functions in these Boards is subject to even greater dangers than those inherent in American administrative law, for the judges here are subject not only to the "departmental bias" of the ordinary administrative agency but have, in addition, a pecuniary interest, since they are themselves producers financially interested in the operation of the scheme. To paraphrase Mr. Justice Sutherland in *Carter v. Carter Coal Co.*,<sup>144</sup> the judicial power here has not even been delegated to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.

As a result of these criticisms, a departmental committee was appointed in 1938 to inquire into the existing procedure and to suggest desirable modifications. Its report issued in 1939,<sup>145</sup> though rejecting the contention that the combination of functions in these agencies was a radical departure from the principles of English justice, did make certain recommendations. Among these were the hearing of disciplinary cases by a small committee of the Board, with an independent chairman having legal qualifications and experience—a step, it should be noted, in the direction of "internal" separation—and a right of appeal to the High Court on points of law. These recommendations, however, have not yet been adopted and, to quote Dr. Allen, "the present position is so unsatisfactory as to violate elementary principles of justice."<sup>146</sup>

<sup>144</sup> 298 U. S. 238, 311 (1936).

<sup>145</sup> Cmd. 5980.

<sup>146</sup> *Op. cit. supra* note 66, at 56. See *Rex v. Milk Marketing Board* (1934), 50 T. L. R. 559, as illustrative of the difficulties that may be involved.

Similar problems arising from the concentration of functions often come up in English licensing cases. See, e.g., *Frome United Breweries Co. v. Bath Justices*, [1926] A. C. 586; *Rex v. Howard*, [1902] 2 K. B. 363, especially at 377; *Rex v. London County Council*, [1892] 1 Q. B. 190.

Many other agencies in England are given disciplinary powers similar to those of the Marketing Boards. Some of these are what Dr. Robson has aptly termed "domestic tribunals";<sup>147</sup> e.g., the large number of voluntary industrial and trade associations, or even social and sporting clubs, where experience has shown that internal discipline is necessary among members if the desired objects of their collective association are to be attained. Closer to the normal type of administrative agency in this regard are certain important professional associations which Parliament has vested with authority to apply disciplinary measures. Among these are the General Medical Council, the Law Society, the Central Midwives Board, and other similar bodies.<sup>148</sup> The dangers that can arise here if the disciplinary power is not subject to proper procedural safeguards is shown by the case of *Law v. Chartered Institute of Patent Agents*.<sup>149</sup> The Institute of Patent Agents, which we have had occasion to refer to in connection with the *Lockwood* case,<sup>150</sup> is the professional association in charge of the register of patent agents, under the general supervision of the Board of Trade. The council of the Institute, having received a complaint from the Admiralty concerning the alleged disclosure by the plaintiff of secret naval inventions, referred the matter to its discipline committee to ascertain if the plaintiff, who was a member of the Institute, had been guilty of "disgraceful professional conduct" for which he could be removed from the register under Rule 31 of their charter. They formulated certain allegations against the plaintiff and then applied under Rule 19 of the Register of Patent Agent Rules, 1908,

<sup>147</sup> *Op. cit. supra* note 104, at 219. For a recent treatment, see 99 L. J. (N. S.) 144 (1949).

<sup>148</sup> See *General Medical Council v. Spackman*, [1943] A. C. 627; *Leeson v. General Council of Medical Education* (1889), 43 Ch. D. 366; *Stock v. Central Midwives Board*, [1915] 3 K. B. 756; *Rex v. Architect's Registration Tribunal*, [1945] 2 All E. R. 131, for "natural justice" cases before some of these bodies. Cf. *Russell v. Duke of Norfolk*, [1949] 1 All E. R. 109; *MacLean v. The Workers' Union*, [1929] 1 Ch. 602; *Rex v. Complaints Tribunal of Central Profiteering* (1920), 37 T. L. R. 228.

<sup>149</sup> [1919] 2 Ch. 276.

<sup>150</sup> *Supra* p. 177.

to the Board of Trade for the erasure of the plaintiff's name from the register. This procedure ultimately failed, and the council then proceeded under Rule 32 of their charter, which empowered the council to expel members for discreditable acts, after hearing the accused. The court held that the resolution of the council expelling the plaintiff was invalid, for the council was not an impartial judge. The council was acting in a judicial capacity and "a person who has a judicial duty to perform is disqualified from performing it if he has a bias which renders him otherwise than an impartial judge, or if he has so conducted himself in relation to the matters to be investigated as to create in the mind of a reasonable man a suspicion that he may have such a bias. Applying that principle to the facts of this case it is, in my opinion, impossible to deny that the conduct of the council in preferring and supporting the charges against the plaintiff before the Board of Trade would be calculated to raise in the mind of a reasonable man grave doubts of their ability to conduct with impartiality a judicial investigation into the truth of the selfsame charges."<sup>151</sup>

The application of the rule against bias to the administrative process, it must be admitted, presents some difficulties, for administration, by its very nature, cannot be wholly uninterested in the cases with which it deals. Being charged with the execution of a definite legislative policy, the administrator cannot fail to have a positive bias in favor of that policy. Having a duty to promote some public service, such as public health or housing, he cannot be entirely indifferent to the results of his actions; especially as his political future more often than not may depend on those results.

Recognizing this, the Committee on Ministers' Powers drew attention, in its discussion of the bias rule, to what may be called a "departmental bias"; *i.e.*, the predilection of the Executive toward the policy to which it is committed. Such bias—what

<sup>151</sup> [1919] 2 Ch. at 290.

Dep't  
bias



✓ Dean Landis terms "psychological interest"<sup>152</sup>—may be more compelling than even a pecuniary interest. "Indeed we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest. No honest man acting in a judicial capacity allows himself to be influenced by pecuniary interest: if anything, the danger is likely to be that through fear of yielding to motives of self-interest he may unconsciously do an injustice to the party with which his pecuniary interest may appear to others to identify him. But the bias to which a public-spirited man is subjected if he adjudicates in any case in which he is interested on public grounds is more subtle and less easy for him to detect and resist."<sup>153</sup> ✓

This type of bias is well illustrated by the position of the Minister of Health under the English housing acts. The Minister under them is the confirming authority for housing schemes prepared by the various local authorities. He is in the position of a judicial tribunal as far as the property owners affected are concerned, for it is he who considers their objections to the compulsory acquisition of their property. He is, theoretically, an impartial tribunal, which can objectively appraise the contentions of both sides and dispose of the case as justice and the furtherance of the legislative policy may require. As stated by a leading departmental witness before the Donoughmore Committee, the controversy in these cases is wholly between the local authority and the property owner; "the Minister has no axe to grind in these matters at all."<sup>154</sup>

In practice, however, the Minister is not indifferent to the results in these cases. He is, in the first place, the one who has been charged by Parliament to carry out the legislative policy of providing sufficient houses for the country. His is the re-

<sup>152</sup> The Administrative Process (1938) 92.

<sup>153</sup> Report of the Committee on Ministers' Powers, 78.

<sup>154</sup> Sir Maurice L. Gwyer, Minutes of Evidence, 27.

sponsibility for seeing that adequate housing facilities are in fact provided, and he cannot be wholly unconcerned in the execution of the Parliamentary program, for his political reputation depends upon it. The Minister has, therefore, taken great interest in the furtherance of housing schemes, and has, indeed, usually taken the initiative in encouraging the formulation of such schemes by local authorities. As the central authority charged with the duty of giving effect to the housing program, he has generally stimulated the local authorities into activity. Being to some degree interested in the result, the Minister cannot be a wholly impartial tribunal when it comes to the confirmation of these schemes; he cannot approach these cases with the virgin mind of a judge. As expressed by a member of the Committee on Ministers' Powers: "There are three parties, the subject, the local authority and the Minister of Health, and the suggestion is that the Minister of Health looks down from Olympus upon these struggling mortals, and judicially holds the balance. But the god has come down from the top of the mountain and has pushed that local authority into activity, and that is its general policy."<sup>155</sup>

One has a delicate balance to strike in these cases. On the one hand, there is the public interest in the co-ordinated execution of the legislative program. To expect him not to be biased in favor of this program "is setting the Minister an exacting standard; he has a duty to promote some public service such as housing or health or transport and yet at the critical moment he must hold himself back. Is not the departmental interest also the public interest?"<sup>156</sup> On the other hand, there is the desire of those affected to be judged by an impartial tribunal. If one insists that the social interest in a co-ordinated policy requires that the adjudicatory function be performed by the central department responsible for the execution of the policy, even then there is much that can be done by fair procedural methods. "Procedure at this

<sup>155</sup> Sir Warren Fisher, *ibid.*

<sup>156</sup> Carr, *op. cit. supra* note 62, at 121.

stage must be framed to require that the special methods of the administrative process operate in such a way as to give convincing assurance, not that the deciding body is indifferent to the result, because it is usually charged with responsibility for continuous protection and advancement of a particular public interest or policy, but that its decision is not motivated by any desire to deal with the parties or their interest otherwise than in the manner which an objective appraisal of the facts and the furtherance of the public duty imposed upon the agency require."<sup>157</sup>

The problem here is not unlike that which arises from the concentration of functions in American administrative agencies. Efforts to solve it can likewise be made along similar lines; *i.e.*, complete separation of functions or merely "internal" separation. A striking example of an attempt at complete separation of judicial from executive functions is to be found in the Requisitioned Land and War Works Act, 1945.<sup>158</sup> That Act, which confers temporary power upon various Ministers to acquire certain lands, represents a notable step forward, from the point of view of procedural safeguards from the normal British procedure for the compulsory acquisition of land by public authorities. Normally, the sole safeguard for the property owner in these cases is an appeal to the Minister of the department whose policy is involved in the purpose for which the acquisition is sought. The only opportunity for the owner to state his case, as we have seen, is at a public local inquiry conducted by a subordinate official of the department concerned, usually a person without judicial experience or training and having no power to give any decision or to do anything other than prepare for his Minister a report which the property owner has no opportunity to see. The Requisitioned Land and War Works Act provides for the hearing of such cases by an independent body, the War Works Commission, set up under the Act. If there are any objections

<sup>157</sup> Report of the Attorney General's Committee, 43.

<sup>158</sup> 8 & 9 Geo. VI, c. 43, Parts I & II.

to the compulsory acquisition of land by a Minister under the Act, the matter is to be referred to the Commission for a report. The Commission is to afford any person who objected an opportunity of appearing before and being heard by a person appointed by them. The report of the Commission on the case is to be sent by the Minister to any objectors and to be published in such other manner as he deems appropriate. Except in certain specified cases, the Minister may not proceed with the acquisition where the Commission reports that the land ought not to be acquired. Even where he may proceed otherwise than in accordance with the report, he must lay before Parliament a copy of the report and a statement of the reasons why he intends to carry out the proposals notwithstanding the report, and a resolution of either House may compel compliance with the report.

"Internal" separation of functions in English agencies can be achieved by segregating the deciding officials from the rest of the department. Efforts to accomplish this would move in the direction of setting aside in the department known individuals to make the decisions, who would be in a position of some independence. This would establish within the department a group of semi-independent tribunals to deal with specific types of cases. Other efforts along this line would deal with the hearing officer, seeking to place the inspector at public local inquiries in a position analogous to that of American examiners under the Administrative Procedure Act. One might go even further and create a group of wholly independent inspectors such as that suggested by a member of the Donoughmore Committee; *i.e.*, what he called a "Department of Inspectors," under the Treasury, from whose number would be assigned inspectors to deal with cases arising in the various ministries.<sup>159</sup> Such suggestions in the

<sup>159</sup> Sir Roger Gregory, Minutes of Evidence, 116. An interesting example of such "separation" was contained in the Housing, Town Planning, &c., Act, 1909, 9 Edw. VII, c. 44, Sched. 1. Under its provisions, where the land proposed to be acquired compulsorily for the provision of housing for the working classes was situated in London, or a borough, or urban district, the local inquiry was to be

direction of "internal" separation, though undoubtedly of value as far as they go, are but partial solutions of the problem. The crux of the matter lies in the fact that the ultimate power of decision rests with the Minister who has at least a "psychological interest" in the result. In all of these cases, one is, in a sense, "appealing from Caesar to Caesar,"<sup>160</sup> where the final decision rests with the Minister.

This, however, is only one side of the bias problem. Of no less importance is the need to insulate the hearing and deciding officials from unauthorized contacts with one of the parties. The danger involved in decisions upon *ex parte* evidence seems obvious: if the right to be heard is to be of any value, one must know in good time and be permitted to controvert the opposing party's case. Indeed, the rule against hearing one party in the absence of the other has long been a principle governing all proceedings which are judicial in character, a principle that applies as well to administrative agencies and even to domestic tribunals.<sup>161</sup> The judicial enforcement of the principle in England was greatly stimulated by the exposition by the Donoughmore Committee of the concept of "natural justice" and the inclusion of the principle in that concept; it has been applied in a series of cases under the housing acts.

In the first of these cases, *Errington v. Minister of Health*,<sup>162</sup> the local authority made a clearance order under the Housing Act, 1930, and submitted it to the Minister of Health for confirmation. Once such confirmation was secured, the authority could effect the clearance either by ordering demolition or by compulsorily purchasing the land and itself demolishing buildings unfit

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held by "an impartial person, not in the employment of any Government Department."

<sup>160</sup> Sir Charles Morton, *Minutes of Evidence*, 188.

<sup>161</sup> See *Broadbent v. Rotherham Corporation*, [1917] 2 Ch. 31, as an example of a pre-Donoughmore Committee case.

<sup>162</sup> [1935] 1 K. B. 249.

for habitation.<sup>163</sup> The appellants in this case gave notice of objection, after they had been notified of the order, and the Minister then caused a public local inquiry to be held in accordance with the Act. The property owners contended that a clearance order was not necessary as the desired improvements could be achieved by repairs and reconditioning. The Ministry, seeking to avoid the expense of the clearance scheme, sought to persuade the parties to agree to a compromise, and after the inquiry sent the inspector back to accomplish this. The local authority, however, maintained that the proper way of dealing with the situation was for the Minister to confirm its clearance order, and sent resolutions to that effect to the Ministry. It also proposed sending a deputation to the Ministry, but a representative of the Ministry, in replying to this suggestion, stated that "in view of the quasi-judicial function which the Minister has to exercise there would be considerable difficulty in the way of receiving a formal deputation representing one side only." Instead, as a leading official of the Ministry was visiting that part of the country, it was arranged for him and the inspector who had held the inquiry to meet the members of the proposed deputation and to inspect the area in question. No representatives of the owners were present at the meeting or inspection. The Minister then confirmed the order without affording to the objectors any further opportunity to be heard.

The Court of Appeal quashed the confirmation order, holding that the Minister had failed to conform to the rules of "natural justice." The Minister in arriving at his decision was acting in a quasi-judicial capacity—the "inquiry is of the nature of a quasi-judicial inquiry in which, although the rules of procedure of a Court of Justice may not be followed, the ordinary principles of fair play, have to be observed."<sup>164</sup> The principles of British

<sup>163</sup> The local authority has been held to have an unfettered discretion in deciding which of the two alternatives to adopt. *E. Robins & Son, Ltd., v. Minister of Health*, [1939] 1 K. B. 520.

<sup>164</sup> [1935] 1 K. B. at 272, per Maugham, L.J.

justice proceed upon the basis that both sides have a right to be heard. Where the Minister takes into consideration evidence which might have been, although it was not, given at the public local inquiry, but was given *ex parte* afterwards without the owners having any opportunity whatever to deal with that evidence, then the confirming order is not within the powers of the Act. "In my judgment," said Greer, L.J., "it is true to say that an order made by a quasi-judicial officer based on materials which are not the materials referred to in para. 4 of the First Schedule is an order which is not within the powers of the Act, having regard to the proposition which has been established in common law that a quasi-judicial officer in exercising his powers must do so in accordance with the rules of natural justice, that is to say, he must hear both sides and must not hear one side in the absence of the other."<sup>105</sup>

The cases which followed *Errington's* case have tended to limit its doctrine. The first of these was a decision by Swift, J., shortly afterwards.<sup>106</sup> The local authority in that case had passed a resolution declaring that a certain area should be a clearance area. The town clerk then visited the Ministry of Health and consulted certain officials of the Ministry with regard to the form the proposed clearance order should take. He subsequently wrote to the Ministry asking them to peruse an enclosed draft of the order, inviting observations thereon. The proposed order was then revised in accordance with the reply of the Ministry. None of the property owners affected were informed of this, for it occurred at an early stage of the Housing Act procedure, before the holding of the public local inquiry and even before any objections could be made. Swift, J., held that the action of the Ministry at this stage was unobjectionable. The rule in *Errington's* case bars such action only where the Minister is acting in a quasi-judicial capacity. Under the procedure prescribed by this

<sup>105</sup> *Id.* at 268.

<sup>106</sup> *Frost v. Minister of Health*, [1935] 1 K. B. 286.

Act, he acts in such capacity only after objections to the clearance order are made by property owners. "From the moment an objection is made the Minister is exercising quasi-judicial functions, but it seems to me to be clearly recognized by the Court of Appeal that up to the time of objection being made the Minister acts in an administrative, and not a judicial, capacity."<sup>167</sup> Until the time of objection, at any rate, the Minister can give the local authority any advice he thinks fit.

This limitation upon the rule of the *Errington* case was approved of by the Court of Appeal in *Offer v. Minister of Health*.<sup>168</sup> The Minister may participate in the preparation of housing schemes as far as he deems necessary, being required to act impartially as a judge only after objections are raised to a specific order. "To my mind," said Greer, L.J., "Parliament intended that these semi-official duties should be conferred upon a Minister who naturally will have some knowledge of the matter before he begins his semi-judicial inquiry, and will possibly have had communications with the local authority before what I have called the 'lis' is joined between the objecting property owners and the local authority, and who will therefore have some knowledge and have given some opinion about the matter."<sup>169</sup>

One wonders, however, whether this distinction between the administrative capacity of the Minister at one stage in the procedure and his quasi-judicial capacity at another is not more apparent than real.<sup>170</sup> Although not literally performing a judicial function prior to the objection stage, his actions then are preparatory to the later stage, when he clearly must act judicially. To permit him to act as he did in the *Frost* and *Offer* cases is to

<sup>167</sup> *Id.* at 293.

<sup>168</sup> [1936] 1 K. B. 40.

<sup>169</sup> *Id.* at 48. See, similarly, *B. Johnson & Co. v. Minister of Health*, [1947] 2 All E. R. 395; *Summers v. Minister of Health*, [1947] 1 All E. R. 184; *Price v. Minister of Health*, [1947] 1 All E. R. 47; *Miller v. Minister of Health*, [1946] K. B. 626.

<sup>170</sup> See *Horn v. Minister of Health*, [1937] 1 K. B. 164, and Dr. Allen's criticism, *op. cit. supra* note 66, at 147.



render him incapable of performing his later function of deciding whether to confirm the clearance order in the truly judicial manner required of him by *Errington's* case. "A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."<sup>171</sup> In giving advice to the local authority on the proposed order, the Minister was acting inconsistently with the subsequent exercise of his judicial powers. Such action would not unnaturally tend to predispose him in favor of the proposed order and would prevent him from performing his quasi-judicial function impartially. The problem here, it must be admitted, is a difficult one. The legislative policy of a housing program under the centralized control of the Minister would seem to imply a power in him to co-ordinate that program by actively assisting the local authority to carry it out. The difficulty arises in the subsequent exercise of judicial power over the same subject matter by the Minister. A not dissimilar problem has arisen in connection with the work of American administrative agencies with regard to the investigation by an agency prior to hearing and decision. The attempted solution under the Federal Administrative Procedure Act—the insulation of those in the agency who exercise the deciding function from unauthorized contacts with those who have investigated—might well prove useful in minimizing the difficulties arising under the English procedure.<sup>172</sup>

The type of "departmental bias" which we have been discussing with reference to the power of the Minister of Health under the

<sup>171</sup> Report of the Attorney General's Committee, 56.

<sup>172</sup> Other cases bearing on this point are: *Denby & Sons v. Minister of Health*, [1936] 1 K. B. 337; *In re J. W. B. Simeon*, [1935] 2 K. B. 183; *Re Manchester (Ringway Airport) Compulsory Purchase Order* (1935), 153 L. T. R. 219; *Estate and Trust Agencies v. Singapore Improvement Trust*, [1927] A. C. 898. Cf. *Rex v. Minister of Transport* (1931), 144 L. T. R. 700. On the closely related problem of what in this country has come to be known as "official notice," see *Rex v. City of Westminster Assessment Committee*, [1941] 1 K. B. 53.

English housing acts to confirm compulsory purchase orders can perhaps be even better illustrated by the position of the Minister of Town and Country Planning under the New Towns Act, 1946.<sup>173</sup> Under Section 1 of that Act, "if the Minister is satisfied after consultation with any local authorities<sup>174</sup> who appear to him to be concerned that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town." Once an area has been so designated as a new town, the Minister is empowered to establish a development corporation for the purposes of the development of the town. Extensive powers are given to such a corporation over the laying out and development of the proposed new town, including the power to acquire compulsorily any land within the designated area or any adjacent land which they require for purposes connected with the development of the new town or any other land which they require for the provision of services for the purposes of the new town.

Under the First Schedule to the Act, where the Minister proposes to make an order under Section 1 designating an area as a proposed new town, he must first prepare a draft order which must be published in certain newspapers in the area (as well as the *London Gazette*), and opportunity must be given for objections to be made to the proposed order. "If any objection is duly made to the proposed order and is not withdrawn, the Minister shall, before making the order, cause a public local inquiry to be held with respect thereto, and shall consider the report of the person by whom the inquiry was held."

In accordance with a leading report on town planning—the so-called Greater London Plan of 1944, issued by a group of experts in the field, headed by Sir Patrick Abercrombie—it was

<sup>173</sup> 9 & 10 Geo. VI, c. 68.

<sup>174</sup> See *Rollo v. Minister of Town and Country Planning*, [1948] 1 All E. R. 13; *Fletcher v. Minister of Town and Country Planning*, [1947] 2 All E. R. 496.

proposed to form certain new towns in the area around London, popularly characterized as "sattelite towns," to relieve the congestion in the metropolis. The town of Stevenage was one of those suggested for such development. In May 1946, before the New Towns Act had been passed, the bill being at that time before the House of Commons, the Minister attended at Stevenage Town Hall and made a speech indicating that Stevenage had been chosen by the Ministry as one of the new towns to be established under the forthcoming act. "In the course of his speech, he said: 'I want to carry out in Stevenage a daring exercise in town planning.' At that point, according to the reporter, there were jeers and he said: 'It is no good your jeering. It is going to be done (applause and boos and cries of "Dictator").' Later on he said: "The project will go forward because it must go forward . . . . While I will consult as far as possible all the local authorities, at the end, if people become fractious and unreasonable, I shall have to carry out my duty. (Voice: "Gestapo").'"<sup>175</sup>

It was claimed in an application to quash the Stevenage New Town Designation Order, 1946, under the appeal provisions of the New Towns Act,<sup>176</sup> that this speech showed "that the Minister at that time had already made up his mind that Stevenage was to be one of the new towns, and . . . that when, under the first clause of the Bill which became the Act of 1946 and sched. I, the Minister had to consider the objections which were made to the proposal, he approached that question not in a fair-minded way, but with a closed mind, as it has been called, and that he never lost the attitude of mind which he had when he made that speech."<sup>177</sup>

In the absence of further evidence of bias on the part of the

<sup>175</sup> *Franklin v. Minister of Town and Country Planning*, [1947] 1 All E. R. 612, 614.

<sup>176</sup> Similar to those under the English housing acts, *supra* p. 209.

<sup>177</sup> *Franklin v. Minister of Town and Country Planning*, [1947] 1 All E. R. at 615.

Minister, Henn Collins, J., had no difficulty in disposing of this claim, and in this part of his judgment he was upheld by the Court of Appeal and the House of Lords. He started by admitting that if one is "to judge by what [the Minister] said at the public meeting which was held very shortly before the Bill, then published, became an Act of Parliament, I could have no doubt but that any issue raised by objectors was forejudged. The Minister's language leaves no doubt about that." But, he went on, this does not prove that the Minister's bias continued up to the time of the order. The onus rested on the objectors to show that the Minister did not have an open mind at the time of the order, and the objectors' burden was not met by evidence of bias some months earlier. "Though that was [the Minister's] attitude two days before the bill received its second reading, it is on the objectors to prove that the Minister was in like mind, or at least, had not an open mind, from and after, at latest, the inception of the public inquiry, which was held in Oct. 1946."<sup>178</sup>

The learned judge did, however, find evidence of bias in the Minister's handling of the objections raised to the difficulties of water supply and sewage disposal under the proposed scheme. He reached the conclusion on the ground that a letter of the Minister issued after the local inquiry, in which he discussed the most important objections raised at the inquiry, conceded that no final plan to meet the difficulties of water supply and sewage disposal had been decided upon and that this was evidence that the Minister had not weighed the objections with an open mind. "It is obvious that those difficulties must be met before the scheme can go through. The Minister acknowledges that they have not been met, and that he is taking advice as to how it can be done. *Non constat* that any way will be found, and yet with that fundamental problem still outstanding, the Minister confirms his order. How can it be said that he weighed the objection with an open

<sup>178</sup> *Id.*, [1947] 1 All E. R. 396, 398. Cf. *United States v. Morgan*, 313 U. S. 409, 421 (1941).

mind when he acknowledges that he did not, and does not, know the force of it?"<sup>179</sup>

On this point, the Court of Appeal differed from Henn Collins, J., saying that in such a wide and comprehensive scheme it was not necessary for the Minister to decide all the details before making the order. "In my opinion," Lord Oaksey, L.J., asserted, "the evidence with reference to the disposal of sewage and water supplies and the way in which the matter was considered at the inquiry and in the letter of the Minister . . . afford no evidence of bias whatever. It is clear that, on the designation of the new town in the way in which it had to be designated, all the problems raised by the establishment of such a new town could not possibly be gone into in detail. If it had been proved or if there had been evidence before the Minister, that the question of water supply and sewage disposal could not be carried out—that it was absolutely impracticable—it is possible, in my opinion, that HENN COLLINS, J., might have been right. That, however, was not the evidence before the inspector who held the inquiry. It is quite clear from the evidence and from the Minister's letter that those problems were capable of solution, and it was, therefore, no evidence of bias on the part of the Minister that he should make the order before the particular way in which the problem should be solved had been decided. For those reasons, I am unable to agree with the judge's quashing of the order."<sup>180</sup>

The House of Lords, on a further appeal to them by the objectors to the order, agreed with Lord Oaksey, L.J., upon this point. Lord Thankerton, who delivered an opinion in which the rest of the House concurred, went further, however, and examined the question of the position of the Minister under the New Towns Act, 1946. Both Henn Collins, J., and the Court of Appeal had assumed that the functions of the Minister in this case were quasi-judicial in nature and that the rule "against bias,

<sup>179</sup> [1947] 1 All E. R. at 399.

<sup>180</sup> *Id.* at 617.

as applied in the *Errington* case, was, therefore, relevant. In this, Lord Thankerton implied, they were in error. "In my opinion, no judicial or quasi-judicial duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant\*in the present case. The respondent's duties under s.1 of the Act and sch. I thereto are, in my opinion, purely administrative, but the Act prescribes certain methods of, or steps in, the discharge of that duty. . . . the purpose of inviting objections, and, where they are not withdrawn, of having a public inquiry, to be held by someone other than the respondent, to whom that person reports, was for the further information of the respondent, . . . I am of opinion that no judicial duty is laid on the respondent in discharge of these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report."<sup>181</sup> The position of the Minister under the New Towns Act, 1946, is thus different from that of the Minister of Health under the housing acts, which has been discussed above. Under the 1946 Act, "the object of the inquiry is further to inform the mind of the Minister, and not to consider any issue between the Minister and the objectors."<sup>182</sup>

Under the New Towns Act, we have a concentration of functions in the Minister of Town and Country Planning not unlike that in many American administrative agencies. As was stated by Lord Hewart, C.J., with regard to the similar position of the Minister of Transport under the Trunk Roads Act, 1936:<sup>183</sup> "At such an inquiry the Minister . . . is in a somewhat peculiar position. He is the person who makes the draft order which is the subject-matter of the inquiry, and he is the person who, by one of his inspectors, holds the inquiry."<sup>184</sup> The Minister in the

<sup>181</sup> *Id.*, [1948] A. C. 87, 102.

<sup>182</sup> *Id.* at 106.

<sup>183</sup> 1 Edw. VIII & 1 Geo. VI, c. 5, § 6 (3).

<sup>184</sup> *In re* The Trunk Roads Act, 1936, [1939] 2 K. B. 515, 522.

*Stevenage* case was confirming, not an order made by a third party, such as the compulsory purchase order of a local authority under the housing acts in which he was, theoretically at least, an impartial tribunal, but a draft order which he, himself, had prepared. The inquiry required under the New Towns Act, 1946, was thus one "in which the Minister was both judge and at the same time to a certain extent an interested party."<sup>185</sup>

Under these circumstances, the strict rule against bias, as formulated in the *Errington* case, can have no direct application. The rule against bias requires an approach to the dispute at hand with an open mind; but how can the Minister maintain the required impartiality when the order he is called upon to judge has in fact been prepared by himself? It would surely be setting the Minister an impossible standard to expect him to approach such cases with other than a prejudice in favor of his own order. The most that can be required in these cases, where Parliament has made the Minister the judge of his own order, is that he afford to objectors an adequate forum—*i.e.*, the local inquiry—for the presentation of their objections and that such objections be considered before the final order is issued. To repeat the language of Lord Thankerton on this: "The only question is whether he [the Minister] has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report."

Aside from these grounds, the administrative procedure under a statute such as the New Towns Act, 1946, can be subject to little, if any, judicial control. "My Lords," said Lord Thankerton in the course of his opinion, "I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly

<sup>185</sup> Lord Oaksey, L.J., in *Franklin v. Minister of Town and Country Planning*, [1947] 1 All E. R. at 618.

regarded as holding a quasi-judicial office, such as an arbitrator.”<sup>186</sup> This can, however, have little relevance in the instant case. “In the present case, the respondent having no judicial duty, the only question is what the respondent actually did, that is, whether in fact he did genuinely consider the report and the objections.”<sup>187</sup> The question thus comes down to one of bona fides; yet who could dispute the good faith of the Minister—or disputing prove his claim—in the face of the normal ministerial affidavit that “before causing the said order to be made, I personally carefully considered all the objections made by the objectors”?<sup>188</sup>

The situation under the New Towns Act, 1946, it must be admitted, is not very satisfactory from the point of view of ensuring public and professional confidence in the justice of administrative decisions. Under such legislation, as Henn Collins, J., strongly asserted, “the result, put it how you will, is that an objector, who may have everything at stake, has legislative permission to fulminate, but can do no more. However real his grievance, it can be forced on him without any consideration of the merits of his case. Although invited to state his case in public, he cannot secure that what he says will be weighed and considered on its merits, or indeed, at all.”<sup>189</sup>

Despite this undesirable result, it is difficult to quarrel with the opinion of the House of Lords in the *Stevenage* case. As we have indicated, how could their lordships apply the strict rule against bias in a case where Parliament has expressly made the Minister the judge of his own order?<sup>190</sup> At the same time, the case does show the impropriety of such a concentration of

<sup>186</sup> [1948] A. C. at 103.

<sup>187</sup> *Id.* at 104.

<sup>188</sup> See *Robinson v. Minister of Town and Country Planning*, [1947] K. B. 702, especially at 716, for a similar treatment of the position of the Minister under the Town and Country Planning Act, 1944, 7 & 8 Geo. VI, c. 47.

<sup>189</sup> [1947] 1 All E. R. at 397.

<sup>190</sup> *Cf. Wilkinson v. Barking Corporation*, [1948] 1 K. B. 721.



functions in an Executive department. Where the legislature has seen fit to authorize the compulsory purchase of private property to aid in the carrying out of some social-service scheme, it is not desirable that the confirmation of orders for that purpose should be placed in the hands of the body proposing to take over such property. Here surely is the type of case in which one would desire a separation of the functions of administrator and judge. If a complete separation is considered impracticable because of the possible harm to successful administration, there ought at least to be some form of "internal" separation within the department—along the lines of a separate tribunal within the Ministry for the confirmation of such orders—so that the objections of the property owner may be considered impartially before the order for the compulsory acquisition of his property is finally issued.

## CHAPTER VIII

### 3. LAW AND FACT—THE SCOPE OF REVIEW

The "law-fact" distinction is one that is fundamental in common-law jurisprudence and has, indeed, been the keystone upon which our whole system of appellate review has been built. As applied to the field of administrative law, this separation of law and fact, as Sir Cecil Carr has pointed out, sounds attractively simple. "The administrative tribunal would find the facts and the courts would not interfere unless the absence of evidence or the perversity of the finding required them to intervene."<sup>1</sup> Working from this distinction, the courts in this country have been constructing a theory of review which has become crystallized in the so-called "substantial-evidence" rule.

This theory rests, in part, upon a division of labor between judge and administrator, giving full play to the particular competence of each. Questions of law are to be decided judicially; for the judge, both by training and tradition, is best equipped to deal with them. "Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions."<sup>2</sup> These considerations do not apply to the judicial review of the factual issues arising out of administrative determinations. There, the advantages of *expertise* are with the administrator. The fact "findings of an expert commission have a validity to which no judicial examination can pretend; the decision, for instance, of the New York Public

<sup>1</sup> Concerning English Administrative Law (1941) 108.

<sup>2</sup> Landis, The Administrative Process (1938) 152. (Italics omitted.)

Service Commission that a gas company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the Courts in a similar case."<sup>3</sup>

The suggested division of labor is not fully carried out, however, for constitutional principles require some judicial review upon fact as well as law. "An approach to the problem of judicial review cannot neglect the fact that its essence springs from the Anglo-American conception of the 'supremacy of law' or 'rule of law', as it is variously called."<sup>4</sup> That concept calls for a judicial examination of the administrative determination to see that it has an evidentiary basis. An administrative finding of fact that is not supported by evidence cannot be said to have been within the jurisdiction conferred upon the agency. Or, to put it another way, "the question whether the administrative finding of fact rests on substantial evidence . . . is really a question of law, for a finding not so supported is arbitrary, capricious and obviously unauthorized."<sup>5</sup>

But though judicial re-examination of the facts is an essential part of review, it must not be so broad as to destroy the values—expertness, specialization, and the like—that were sought in the establishment of administrative agencies. "The supremacy of law," said Mr. Justice Brandeis in an oft-quoted passage, "demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of

<sup>3</sup> Laski, *A Grammar of Politics* (4th ed. 1938) 393.

<sup>4</sup> Landis, *op. cit. supra* note 2, at 123.

<sup>5</sup> Report of the Attorney General's Committee, 88.

fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command."<sup>6</sup>

Judicial review of facts in this country has consequently come to be self-limited by the "substantial-evidence" rule. It is not for the reviewing court to determine the correctness of the administrative determination upon its own independent judgment. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."<sup>7</sup> The court has only to see if the finding is supported by evidence; it is not concerned with the weight of the evidence. "In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."<sup>8</sup> Viewed in this light, the "substantial-evidence" rule becomes a test of the rationality of an administrative determination. Under it, the administrative finding stands only if it is supported by substantial evidence; *i.e.*, by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>9</sup>

Review upon questions of fact, limited by the "substantial-evidence" rule, is a vital element in the judicial control of the Executive. As expressed by a lower federal court: "The rule of substantial evidence is of fundamental importance and marks the dividing line between law and arbitrary power."<sup>10</sup> The requirement of an evidentiary basis for factual determinations

<sup>6</sup> *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 84 (1936).

<sup>7</sup> *Mr. Justice Cardozo in Mississippi Barge Line Co. v. United States*, 292 U. S. 282, 287 (1934).

<sup>8</sup> *Mr. Chief Justice Hughes in St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51 (1936).

<sup>9</sup> *Consolidated Edison Co. v. National Labor Relations Board*, 309 U. S. 197, 229 (1938).

<sup>10</sup> *Carlay Co. v. Federal Trade Com'n.*, 153 F. (2d) 493, 496 (C. C. A. 7th, 1946).

is essential if Executive action is to be confined within legal limits. "The power of administrative bodies to make findings of fact which may be treated as conclusive . . . is a power of enormous consequence. An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'" <sup>11</sup> Judicial review must, therefore, include some review over questions of fact. Administrative determinations of fact should be subjected to at least that test of rationality which the "substantial-evidence" rule provides, "both because review of this scope affords a means of correcting abuses in individual cases and because the cautionary effect of the prospect of such review should help to assure proper administrative adjudication in the first place." <sup>12</sup>

The distinction between "law" and "fact," upon which the scope of judicial review in this country depends, is of equal importance in the English system of review. In this field, "it is generally agreed that the jurisdiction of superior Courts should be invoked only on questions of law—a principle which is already familiar in other spheres, such as appeals to the Court of Criminal Appeal and cases stated to the High Court by justices and other authorities of inferior jurisdiction. To re-open all disputed issues of fact might lead to endless litigation, with no very satisfactory conclusion in the end." <sup>13</sup> Relying upon this distinction, the Committee on Ministers' Powers limited its recommendation of appeals from Executive decisions to points of law. But "while we are of opinion that there should be an absolute and universal right of appeal to the High Court on any point of law from the judicial decision of a Minister or a Ministerial tribunal, we are satisfied that there should as a rule be no

<sup>11</sup> Hughes, C.J., in address to Federal Bar Association in 1931, quoted in Landis, *op. cit. supra* note 2, at 136.

<sup>12</sup> Benjamin, *Administrative Adjudication* in New York (1942) 338.

<sup>13</sup> Allen, *Law and Orders* (1945) 159.

appeal to any Court of Law on issues of fact.”<sup>14</sup> The judicial jurisdiction, here, is strictly limited to questions of law. Review on fact is excluded, even to the limited extent afforded under the “substantial-evidence” rule. •

This, however, assumes that the “law-fact” classification is an exact one, with a clear-cut dividing line between the two in any particular case. Actually, the distinction between “law” and “fact” is not nearly so well defined as is often supposed. “The delusive simplicity of the distinction between questions of law and questions of fact has been found a will-of-the-wisp.”<sup>15</sup> The assumption that “law” and “fact” stand naturally apart rests upon an analysis with only two mutually exclusive pigeonholes: *i.e.*, questions that are not questions of law must be questions of fact, and vice versa<sup>16</sup>—an analysis that often oversimplifies at the cost of distortion. “In truth,” as Professor Dickinson has pointed out, “the distinction between ‘questions of law’ and ‘questions of fact’ really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction. They are not two mutually exclusive *kinds* of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law . . . . It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of ‘fact’, and when otherwise disposed, they say that it is a question of ‘law.’”<sup>17</sup>

Though of great value in pointing out the difficulties involved in the “law-fact” distinction, this statement goes too far in its rejection of that distinction altogether. It is true that “law” and

<sup>14</sup> Report, 108.

<sup>15</sup> Isaacs, “The Law and the Facts” 22 Col. L. Rev. 1 (1922).

<sup>16</sup> Morris, “Law and Fact” 55 Harv. L. Rev. 1303, 1315 (1942).

<sup>17</sup> Administrative Justice and the Supremacy of Law (1927) 55. Cf. Frankfurter, J., concurring in *Trust of Bingham v. Commissioner*, 325 U. S. 365, 378 (1945).

"fact" cannot be as readily discriminated as the judicial language in many of the cases might lead one to believe. "But the rejection of the distinction, though it may accord with the fact, leaves nothing upon which to base a philosophy as to the appropriate sphere of administrative and judicial activity."<sup>18</sup> The concept of the rule of law requires some degree of judicial control over the substance of Executive determinations; the supremacy of law implies a "belief in an inviolable area for the resolution of claims by courts."<sup>19</sup> At the same time, the claims of administration—the values sought in the growth of the administrative process, expertness, efficiency, and the like—call for some limitation upon the scope of review. The distinction between "law" and "fact" furnishes at least some guide—in this case, the only one available—for the construction of a proper theory of review.

The great difficulty, of course, lies in the use of the distinction to determine the scope of review in particular cases. As stated by Mr. Justice Jackson in *Dobson v. Commissioner*,<sup>20</sup> where the "substantial-evidence" rule was stated to be the test applicable to the scope of review in tax cases: "Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing 'questions of law' from 'questions of fact'. This is the test Congress has directed, but its difficulties in practice are well known and have been the subject of frequent comment. Its difficulty is reflected in our labelling some questions as 'mixed questions of law and fact' and in a great number of opinions distinguishing 'ultimate facts' from evidentiary facts. It is difficult

<sup>18</sup> Landis, *op. cit. supra* note 2, at 146. Cf. Jaffe, "The Judicial Universe of Mr. Justice Frankfurter" 62 Harv. L. Rev. 353, 375, n.54 (1949).

<sup>19</sup> *Ibid.*

<sup>20</sup> 320 U. S. 489, 501 (1943). Section 1141 (a) of the Internal Revenue Code was amended in 1948 so that review of the decisions of the Tax Court now proceed in the same manner and to the same extent as decisions of the federal district courts in civil actions tried without a jury. This apparently changes the rule of the *Dobson* case.

to lay down rules as to what should or should not be reviewed in tax cases except in terms so general that their effectiveness in a particular case will depend largely upon the attitude with which the case is approached."

Similar problems have arisen in the English income-tax cases. The applicable statute, the Income Tax Act, 1918,<sup>21</sup> allows the aggrieved taxpayer, immediately after the determination by the General or Special Commissioners (the administrative appeal tribunals under the Act) of an appeal, if dissatisfied with the determination as being erroneous in point of law, to appeal to the High Court, which is to "hear and determine any question or questions of law arising on the case." This provision, basing the scope of review upon the "law-fact" distinction and limiting review to questions of law, seems essentially similar to that construed by the Supreme Court in *Dobson v. Commissioner*. Such right of appeal was first conferred by the Customs and Inland Revenue Act, 1874,<sup>22</sup> and, in the seventy-odd years since that time, according to one observer, "the issue, upon cases stated by the Commissioners, whether a question is one of 'fact' or of 'law' has been *directly* before the Courts in well over two hundred cases."<sup>23</sup> Despite this great mass of cases, however, much truth remains in Lord Justice Scrutton's observation in an important case: "In my view it is impossible to reconcile the various statements of high authorities on the division between fact which is unappealable and law which is appealable."<sup>24</sup>

The general principles governing the scope of review are clear, for they involve but a restatement of the "law-fact" distinction much as do those arising out of the American cases. The jurisdiction of the reviewing court is limited to questions of law; it does not extend to questions of fact. But it is the reviewing court

<sup>21</sup> 8 & 9 Geo. V, c. 40, § 149.

<sup>22</sup> 37 & 38 Vict., c. 16, § 9.

<sup>23</sup> Farnsworth, *Income Tax Case Law* (1947) 43.

<sup>24</sup> *Rees Roturbo Development Syndicate, Ltd., v. Commissioners of Inland Revenue*, [1928] 1 K. B. 506, 517.



that must ultimately decide into which category the situation before it falls. "Law" and "fact" are not mutually exclusive categories that stand wholly apart. In practice, "legal generalities and facts of cases must function together. The facts-of-a-case are legally significant aspects of events, and are 'found' by lawyers and judges, whose legal ideas affect selection and identification."<sup>25</sup>

The difficulties involved in applying the "law-fact" distinction to particular tax cases are well shown in the opinion of Lord Wrenbury in the leading case of *Great Western Ry. Co. v. Bater*.<sup>26</sup> That case involved the finding by the Special Commissioners for Income Tax that a certain railway clerk was the holder of a public office or employment of profit of a public nature in respect of whose salary the railway company was liable to assessment under the Income Tax Act. The question of the nature of employment is neither exclusively one of fact nor of law. It is the sort of question which the courts have dubbed "mixed questions of law and fact"—the label chosen reflecting the judicial uncertainty in the matter. In the instant case, the problem is resolved by Lord Wrenbury in favor of review. "My Lords," says he, "there is in this case much that is difficult, but one thing seems to me quite plain, and that is, that the question here is not, as the Court of Appeal thought, a question of fact. It was for the Special Commissioners to find and state all the facts respecting the nature of the office or employment as to which the question arises. It was not for the Court to question those facts in any way. But the question for the Court was whether, upon those facts, Mr. Hall held an office of employment or profit *within the meaning of the Act*. That is a question of law. What does the Act mean? What is the true construction? It is impossible to escape deciding that question of law by saying that the Act is so slovenly and so unintelligible that it is impossible satisfactorily to ascertain and declare its meaning . . . . The Court must as

<sup>25</sup> Morris, *supra* note 16, at 1303.

<sup>26</sup> [1922] 2 A. C. 1.

best it can arrive at some meaning of the language which bears upon the particular case before it for decision, although it may be, as I think it is, impossible to declare in general terms the true meaning so as to guide and control in the future a decision upon other facts.”<sup>27</sup>

Lord Wrenbury’s approach here, leading to a broad review of the administrative determination, is to be contrasted with that of the House of Lords in *Commissioners of Inland Revenue v. Lysaght*,<sup>28</sup> a later case which dealt with the question of whether or not the administrative determination that the taxpayer was a “resident” was a “finding of pure fact” or one of “law.” “The distinction between questions of fact and questions of law,” said Lord Buckmaster, “is difficult to define, but according to the respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the legal construction to be placed upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the words ‘reside’ or ‘residence’ in other Acts may have special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning.”<sup>29</sup> Although Lord Wrenbury’s approach thus seems to have been rejected, there is still the caveat on the other side contained in the dissenting opinion of Viscount Cave, L.C. A finding such as that in this case, he asserts, “is a mixed finding of fact and law; and unless such a finding is open to review by the Courts little benefit will accrue to the subject from the right which is given him to have a case stated for the opinion of the King’s Bench Division.”<sup>30</sup>

It would be of little use, at least in a study of this kind, to

<sup>27</sup> *Id.* at 30.

<sup>28</sup> [1928] A. C. 234.

<sup>29</sup> *Id.* at 247.

<sup>30</sup> *Id.* at 241.

attempt to follow further the labyrinth of case law under the English income-tax acts. Those already mentioned indicate that the same problems of "law" and "fact" have confronted the courts in this field on both sides of the Atlantic. What is of even more interest to the comparative student is the emergence from the English cases of a principle of review not unlike that enunciated by the Supreme Court in *Dobson v. Commissioner*, although somewhat narrower. The net result here is thus something akin to the "substantial-evidence" rule without the test of "substantiality."

Such a theory of review permits at least a limited re-examination of the facts, and, at first sight, seems inconsistent with the oft-expressed English doctrine that administrative findings of fact are not subject to any review in these cases. Jurisdiction to review, however, is acquired by what has been termed the "no-evidence" rule.<sup>81</sup> The analysis is similar to that in the American cases. A finding made with no evidence to support it cannot be said to have been within the administrative competence. The question whether the administrative finding of fact is without evidentiary support is really a question of law, for a finding without such support is arbitrary and clearly *ultra vires*. Or, as expressed by Du Parcq, L.J.: "It seems clear, however, that in both the cases to which I have referred, the House of Lords regarded the question as one which, although its solution depended (as the solution of every problem must depend) on the facts found, was ultimately a question of law. This view of the matter may be expressed by saying that, when once the facts have been ascertained, then only one answer to the question posed can be right. Opinions may differ, but that is not to say that more than one of the differing opinions can be correct. Unless the Commissioners, having found the relevant facts and put to themselves the proper question, have proceeded to give the right answer, they may be said, in this view, to have erred in

<sup>81</sup> Farnsworth, *op. cit.* *supra* note 23, at 53.

point of law. If an inference from facts does not logically accord with and follow from them, then one must say that there is no evidence to support it. To come to a conclusion which there is no evidence to support is to make an error in law."<sup>32</sup>

The rule of finality for administrative fact findings in tax cases is thus subject to the "no-evidence" rule. Review can be obtained on the question of evidentiary support as well as on questions of law. "It is well settled that, when the Commissioners have . . . ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review, *provided* (a) that they had before them evidence, from which such a conclusion could properly be drawn, and (b) that they did not misdirect themselves in law in any of the forms of legal error, which amount to misdirection."<sup>33</sup> Within these limits, however, the administrative findings are conclusive. Review on the question of evidentiary support does not allow review upon the weight of evidence or upon the correctness of the administrative determination. Administrative "determinations of questions of pure fact are not to be disturbed any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come: and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs."<sup>34</sup>

The application of the "no-evidence" rule is shown even more clearly in the cases arising under the English housing acts. Section 11 of the Housing Act, 1930,<sup>35</sup> provided a new form of limited appeal for persons aggrieved by compulsory purchase

<sup>32</sup> *Bean v. Doncaster Amalgamated Collieries, Ltd.*, [1944] 2 All E. R. 279, 283. *Cf. Minister of National Revenue v. Wright's Canadian Ropes*, [1947] A. C. 109, 223.

<sup>33</sup> *Viscount Sumner in Commissioners of Inland Revenue v. Lysaght*, [1928] A. C. 234, 243. (Italics added.)

<sup>34</sup> Lord Atkinson in *Great Western Ry. Co. v. Bater*, [1922] 2 A. C. 1, 12.

<sup>35</sup> 20 & 21 Geo. V, c. 39.

orders made under it. The jurisdiction of the High Court to quash such orders upon appeal was limited to those "not within the powers of this Act" or where "the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with." This, as we have seen,<sup>36</sup> was but another way of stating the *ultra vires* theory of review which governed review under the prerogative writs. The scope of review under those writs was based upon the "law-fact" distinction. Their office was to cause the record of the inferior tribunal to be brought up to the superior court for inspection "in order that the superior court may determine from the face of the record whether the inferior [tribunal] has exceeded its jurisdiction or has not proceeded according to the essential requirements of the law, in cases where no direct appellate proceedings are provided by law."<sup>37</sup> Review, here, searches only for errors of law apparent on the face of the record; there is no power in the reviewing court to pass on questions of fact.

But in these cases, too, the question of evidentiary support is construed to be one of law, so that the "substantial-evidence" or "no-evidence" rule is imported into the theory of review. The scope of review thus becomes that stated by an American court: "In reviewing the determinations of administrative boards . . . this court will inquire no further than to determine whether the board kept within its jurisdiction, whether it proceeded upon a proper theory of law, whether its action was arbitrary or oppressive and unreasonable, and whether the evidence affords a reasonable and substantial basis for the order sought to be reviewed."<sup>38</sup> The requirement of evidentiary support is well illustrated by a leading Alabama case, in which the highest court of that state rejected the contention that the order of an administrative board must be upheld, though there was no

<sup>36</sup> *Supra* p. 209.

<sup>37</sup> *Malone v. City of Quincy*, 66 Fla. 52, 56 (1913).

<sup>38</sup> *State v. Jensen*, 205 Minn. 410, 412 (1939).

supporting evidence in the record. The "findings and order of the Board are subject to judicial review to determine whether, in making its determination, it departed from applicable rules of law, and whether its finding had a basis in substantial evidence or was arbitrary and capricious." <sup>39</sup>

The scope of review under the appeal provisions of the English housing acts is essentially similar to what it was under the prerogative writs. In *re Bowman* <sup>40</sup> was the first case heard by the High Court under Section 11 of the 1930 Act. Swift, J., in discussing the scope of review under that section, grafts the "no-evidence" rule into the statute, saying that "an application may be made to this Court under section 11, sub-section 3, only on the grounds there specified—namely, that the order is not within the powers of the Act, or that some requirement of the Act has not been complied with, or on the further ground that there was no evidence to support the order." <sup>41</sup> The reviewing court, however, is precluded from going into the question of the sufficiency of the evidence. The appellant "is not, in my view, entitled to come here and complain that the local authority has made a mistake of fact in making the order. He is not entitled to say that his house is not insanitary or unfit for human habitation, and that, therefore, the order should not have been made. These seem to me to be matters which are left by the legislature entirely to the local authority subject to the confirmation of the Minister of Health." <sup>42</sup> The court cannot interfere with the administrative fact findings, provided only that there was "some evidence" to support them. "If there is evidence on which the local authority and the Minister can act, it is not for this Court to say that they should have come to a different conclusion from that to which they did come,

<sup>39</sup> *Alabama Power Co. v. City of Fort Payne*, 237 Ala. 459, 465 (1939).

<sup>40</sup> [1932] 2 K. B. 621.

<sup>41</sup> *Id.* at 627.

<sup>42</sup> *Id.* at 634.

or that they were wrong in arriving at the decisions at which they arrived."<sup>43</sup>

The "no-evidence" rule is thus of narrow practical ambit; for it serves to invalidate the administrative determination only in a case "in which it may be said that there was no material, no information and no representation before the local authority upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made."<sup>44</sup> The judicial construction of the "no-evidence" rule here approaches that interpretation of the "substantial-evidence" rule against which the minority of the Attorney General's Committee complained. "Under this interpretation, if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need only to read one side of the case and if they find any evidence there, the administrative action is to be sustained and the record to the contrary to be ignored."<sup>45</sup>

The cases have tended to follow this statement by Swift, J., in the *Bowman* case regarding the scope of review, so that, though the basic theory of review is similar to that acted upon by the American courts, the scope of review in practice is not quite so broad.<sup>46</sup> The "no-evidence" rule as applied in the cases is thus narrower than the "substantial-evidence" rule. Under the English test, the reviewing court looks only to see that there is some evidentiary basis for the administrative determination; there is no quantitative examination of the evidence, not even the limited

<sup>43</sup> *In re Bainbridge*, [1939] 1 K. B. 500, 503.

<sup>44</sup> [1932] 2 K. B. at 634.

<sup>45</sup> Report, 210.

<sup>46</sup> See, e.g., *In re Butler*, [1939] 1 K. B. 570; *In re Bainbridge*, [1939] 1 K. B. 500; *Stocker v. Minister of Health*, [1938] 1 K. B. 655; *Re Halse* (1937), 157 L. T. R. 140; *Burgesses of Sheffield v. Minister of Health* (1936), 154 L. T. R. 183. Cf. *Attorney-General v. Manchester Corp.* (1930), 144 L. T. R. 112.

one permitted by the test of "substantiality." If a factual issue is involved, the administrative finding can be interfered with only if the agency concerned had *no* material upon which to base it.<sup>47</sup> Only if there is *no* evidence in support of the finding is the administrative determination not within the powers conferred. The court "is not concerned with the question as to whether, on the facts as set out in the documents and in the evidence on the one side or the other, [it] should have come to the same conclusion or not,"<sup>48</sup> nor even with whether the evidence in support of the finding is *substantial* in the American sense. For, as stated by the High Court, "a very little evidence" may justify an administrative finding of fact.<sup>49</sup> This is to be compared with the attitude of the Supreme Court in *Consolidated Edison Co. v. National Labor Relations Board*,<sup>50</sup> where the Court held that the governing statute, "in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive' means supported by substantial evidence. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The interesting problem in the field of judicial review, as Dean Landis has pointed out, "is the extent to which judges will withdraw, not from reviewing findings of fact, but conclusions upon law. If the withdrawal is due to the belief that these issues of fact are best handled by experts, a similar impulse to withdraw should be manifest in the field of law."<sup>51</sup> Except in the comparatively rare case where finality is given to the administrative conclusion upon law by the enabling act, however, the reviewing

<sup>47</sup> *In re Bainbridge*, [1939] 1 K. B. 500, 502.

<sup>48</sup> *Re the London County Council (Riley Street, Chelsea, No. 1) Order*, 1938, [1945] 2 All E. R. 484, 489.

<sup>49</sup> *Ibid.* Cf. *Robinson v. Minister of Town and Country Planning*, [1947] K. B. 702, where the wording of the enabling act was held to bar even this limited review.

<sup>50</sup> 305 U. S. 197, 229 (1938).

<sup>51</sup> *Op. cit. supra* note 2, at 144.



court on both sides of the Atlantic will determine *de novo* all questions of law raised before it. It is where issues of law blend into issues of fact—the so-called “mixed questions of law and fact”—that the tendency noted by Dean Landis becomes apparent. The increasing deference on the part of the American courts toward administrative expertness on these questions can be gathered by a comparison of *Federal Trade Commission v. Gratz*<sup>52</sup> with some of the more recent cases. The *Gratz* case was the first case on the power of the newly created Federal Trade Commission to restrain “unfair methods of competition” in interstate commerce. The Court there reversed the conclusion of the Commission that the trade practices involved in the case constituted such “unfair” methods. The Court did not confine itself to the question whether reasonable grounds existed for the administrative conclusion. Instead, it determined upon its own independent judgment the applicability of the statutory concept. “The words ‘unfair methods of competition’ are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include.”<sup>53</sup>

*National Labor Relations Board v. Hearst Publications*<sup>54</sup> indicates the extent to which the Court has receded from the attitude embodied in the *Gratz* case. The Court there held that the determination by the National Labor Relations Board concerning the existence of a relation of “employer” and “employee” so as to render the National Labor Relations Act<sup>55</sup> applicable was to be given the same degree of conclusiveness as any other administrative fact findings. The task of making a “completely definitive limitation around the term ‘employee,’” Mr. Justice Rutledge asserts, has been assigned primarily to the Board. “Everyday

<sup>52</sup> 253 U. S. 421 (1920).

<sup>53</sup> *Id.* at 427.

<sup>54</sup> 322 U. S. 111 (1944).

<sup>55</sup> 49 Stat. 449 (1935).

experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and, with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board. . . . the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."<sup>56</sup> It will at once be noted that the determination of the existence of an "employer-employee" relationship is not a purely factual determination. The final conclusion here depends upon the application of the facts as found to the legal concept of the relationship. In addition, the administrative power to act is dependent upon the existence of that relationship, for the Act under which the Board operates is not applicable in its absence. The question is thus one of "jurisdictional fact," like that in *Crowell v. Benson*, to be discussed shortly.

This problem of "mixed questions of law and fact" has been just as constant in English administrative law. In the leading case of *Great Western Ry. Co. v. Bater*, Lord Atkinson protested against "the attempt to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on questions of pure fact. This is sought to be effected by styling the finding on a mixed question of law and fact a finding of fact."<sup>57</sup> This type of judicial analysis is exemplified by *White v. St. Marylebone Borough Council*,<sup>58</sup> in which the court dealt

<sup>56</sup> 322 U. S. at 130, 131.

<sup>57</sup> [1922] 2 A. C. 1, 12.

<sup>58</sup> [1915] 3 K. B. 249.

with the conclusiveness of the Local Government Board's determination under Section 43 of the Housing, Town Planning, &c., Act, 1909,<sup>59</sup> that houses occupied by certain chauffeurs were houses "intended to be used as dwellings for the working classes" within the meaning of the statute. The administrative finding was thus similar to that in the *Hearst* case; *i.e.*, whether a chauffeur was a member of the working classes. Here, too, the court styles the finding as basically one of fact, though there is some confusion in its language. A chauffeur, says Lord Reading, C.J., "is in my opinion, a member of the working classes, applying the ordinary test and interpreting the words 'working classes' in the ordinary and popular sense. These buildings were intended to be used by motor car drivers. They, therefore, were intended to be used by members of the working classes. They were, in my judgment, as a matter of law capable, of being 'intended to be used as dwellings for the working classes' within the meaning of the section, and upon the facts as stated it is clearly open to the Local Government Board to conclude as a matter of fact that they were intended to be used as dwellings for the working classes within the meaning of the section."<sup>60</sup>

Section 25 of the Housing Act, 1936,<sup>61</sup> divides buildings into two classes—"houses" and "other buildings"—for the purpose of clearance resolutions passed under it. The matter on which the local authority is to be satisfied before passing a clearance resolution in the case of houses may be one of two: the first is unfitness for human habitation, and the second is the quality of being dangerous or injurious to the health of the inhabitants by reason of their bad arrangement or the narrowness or bad arrangement of the streets. In the case of other buildings, on the other hand, the latter matter is the only one that is relevant.<sup>62</sup> The question

<sup>59</sup> 9 Edw. VII, c. 44.

<sup>60</sup> [1915] 3 K. B. at 257.

<sup>61</sup> 26 Geo. V & 1 Edw. VIII, c. 51.

<sup>62</sup> Sir Wilfrid Greene, M.R., in *In re Butler*, [1939] 1 K. B. 570, 576.

of the conclusiveness of the administrative finding that certain buildings fall within the word "house" in Section 25, or that they fall within the words "other buildings," is one which the English courts have not answered uniformly, their holding in the particular case depending upon which side of the "law-fact" classification the finding was seen to fall. Swift, J., to whom cases under the housing acts were referred, was of the opinion that the administrative finding here was one of fact which was conclusive upon the reviewing court, subject, of course, to the "no-evidence" rule. "Whether it is or whether it is not a dwelling-house seems to me to be entirely a question of fact on which this Court cannot interfere, but there is always a question of law looming behind that question of fact, namely, whether there is any evidence on which the facts can be found which are necessary in order to establish that it is a dwelling house . . . . I cannot say that there was no evidence before the corporation when they passed their resolution, or before the inspector when he held his enquiry, or before the Minister when he confirmed the order, on which it could properly be found that this was a dwelling-house."<sup>63</sup>

Though the administrative finding here is basically one of fact—*i.e.*, whether the buildings in question fall within the one or the other category depends upon their physical attributes—it also involves a question of statutory interpretation. The application of the statutory term to the particular factual situation, with the resultant legal consequences, is one that is usually thought of as being a judicial function. True it is that this division of labor has never been strictly carried out in our legal system. A jury, as Professor Bohlen has pointed out, asked to judge whether a defendant acted as a reasonably prudent man, takes part in determining what legal effects attach to its fact finding—its verdict "is more nearly akin to a declaration of law than a finding of

<sup>63</sup> *In re Morris*, unreported, quoted in *In re Bainbridge*, [1939] 1 K. B. 500, 503.

fact.”<sup>64</sup> It may be that in cases such as those under Section 25 of the Housing Act the administrative finding is such that the courts, out of deference to the administrative expertness, should exercise only a limited power of review. It does not, however, clarify judicial thinking on the matter, to say the least, for the reviewing court to avoid the issues involved by conveniently styling the administrative finding a finding of fact.

The terming of the question at issue as a “mixed question of law and fact” enables the court to exercise a broader review power. This is the analysis of Sir Wilfrid Greene, M.R., in an important case, where he says in the course of his opinion: “It seems to me that these buildings properly fall under the word ‘houses’ in the section. Whether a particular building does or does not fall under that word is a mixed question of law and fact; fact in so far as it is necessary to ascertain all the relevant facts relating to the building, and law in so far as the application of the word ‘houses’ to those facts involves the construction of the Act.”<sup>65</sup> The reviewing court may use its own independent judgment with regard to the application of the statutory term to the particular factual situation. Due weight is to be given to the administrative ascertainment of the facts, but it is for the court to determine whether those facts come within the statutory concept. This was the approach taken by the Master of the Rolls in the *Butler* case, where he decided whether or not the buildings in question were “houses” on the basis of the facts as found by the administrative body. “As so frequently happens in dealing with Acts of Parliament, words are found used—and very often the commoner the word is, the greater doubt it may raise—the application of which to individual cases can only be settled by the application of a sense of language in the context of the Act, and if I may say so, a certain amount of common sense in using and understanding the English language in a par-

<sup>64</sup> *Studies in the Law of Torts* (1926) 605.

<sup>65</sup> *In re Butler*, [1939] 1 K. B. 570, 579.

ticular context. There may, of course, be cases which fall very near a borderline, and it is impossible to lay down any exhaustive definition as to what is or is not a house. Every case must be considered in the light of its own facts, but in the present case I am of opinion that these buildings come under the word 'houses.'"<sup>66</sup>

Closely related to this problem of "mixed questions of law and fact" is that of so-called questions of "jurisdictional fact." The power of the English reviewing court, as we have seen, is limited to questions of law. It has no power to examine administrative findings of fact further than to see that they have some evidentiary basis. But what if the fact in question is a *jurisdictional* one, in the sense that its existence is a condition precedent to the lawful exercise of the administrative power? "If the right of review is rested on the theory of *ultra vires*, and an administrative officer is given authority, for instance, to destroy infected articles or diseased animals, it is possible to argue that he is 'without jurisdiction' or authority over articles not actually infected or over animals not actually diseased."<sup>67</sup> To apply the general theory of limited review to such cases would seem to run counter to the policy of Anglo-American law against allowing inferior tribunals finally to determine the limits of their own jurisdiction. "No tribunal of inferior jurisdiction," said Farwell, L.J., in an important case, "can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to

<sup>66</sup> *Ibid.* Similar questions often arise under similar statutory provisions; see, e.g., *Smith v. Richmond*, [1899] A. C. 448; *Trim v. Sturminster Rural District Council* (1938), 159 L. T. R. 7; *London County Council v. Illuminated Advertisements Co.*, [1904] 2 K. B. 886. *Cf.* *Rodwell v. Minister of Health*, [1947] K. B. 404.

<sup>67</sup> *Dickinson, op. cit. supra* note 17, at 309.

exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic, not limited—and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe.”<sup>68</sup>

In this country, of course, the ultimate limits to the lawful exercise of any power are those contained in the organic instrument. The doctrine of “constitutional fact” articulated in *Ohio Valley Water Co. v. Ben Avon Borough*<sup>69</sup> is thus but the logical fulfillment of the “jurisdictional-fact” doctrine. Whenever a constitutional issue is raised, said the Court in that case, a fair opportunity must be provided “for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause.”<sup>70</sup> To vest the administrative finding here with finality would be to allow the administrative body itself to find the facts upon which the very exercise of its power depends. The analogy of the direct exercise of power by the legislature is used in *St. Joseph Stock Yards Co. v. United States*<sup>71</sup> to aid in the reaching of this result. “The Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When

<sup>68</sup> *Rex v. Shoreditch Assessment Committee*, [1910] 2 K. B. 859, 880. See *Rex v. Local Government Board*, [1922] 2 I. R. 76, 93.

<sup>69</sup> 253 U. S. 287 (1920).

<sup>70</sup> *Id.* at 289.

<sup>71</sup> 298 U. S. 38, 51 (1936).

the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by a court of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation."<sup>72</sup>

*Crowell v. Benson*,<sup>73</sup> which is the leading American case on the scope of review over questions of "jurisdictional fact," arose under the Longshoremen's and Harbor Workers' Compensation Act.<sup>74</sup> That Act contains two fundamental limitations upon the right of compensation conferred by it. It deals exclusively with compensation in respect of disability or death resulting "from an injury occurring upon the navigable waters of the United States" and it applies only when the relation of master and servant exists. The administrative fact findings upon these two issues, the Court said, cannot be vested with the same finality as ordinary factual determinations. These "determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme,"<sup>75</sup> and the reviewing court may judge the issue of their validity *de novo* upon its own independent judgment. The court in determining whether a compensation order is in accordance with law may itself determine the jurisdictional facts which underlie the operation of the statute.

<sup>72</sup> *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 311 U. S. 570 (1940), raises some doubt about whether the present Court would still follow the *Ben Avon* doctrine, though it must, of course, be considered as good law until overruled.

<sup>73</sup> 285 U. S. 22 (1932).

<sup>74</sup> 44 Stat. 1424 (1927).

<sup>75</sup> 285 U. S. at 54.



It is not to be expected that the *Ohio Valley Water* case doctrine would have any parallel in the English cases on judicial review, for it is based upon American concepts of judicial power under the Constitution. The problem of *Crowell v. Benson*, however, apart from its constitutional implications, is one that should have arisen as well on the other side of the Atlantic. The problem in its application to English administrative law—with the important difference in the lack of constitutional limitations—is well put by Lord Esher, M.R., in *Reg. v. Commissioners for Special Purposes of the Income Tax*:<sup>76</sup> “When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more.” This latter limitation must be borne in mind in considering the application of the doctrine of “jurisdictional fact” to English administrative law; *i.e.*, Parliament may enact that the administrative findings shall be conclusive on questions of “jurisdictional fact,” and even on pure questions of law.<sup>77</sup>

The problem posed in *Crowell v. Benson* has arisen in England under Part V of the Housing Act, 1936, which deals with the

<sup>76</sup> (1888), 21 Q. B. D. 313, 319.

<sup>77</sup> *Cf. Rex v. Ludlow; ex parte Barnsley Corp.*, [1947] K. B. 634, 640.

provision of housing accommodations for the working classes.<sup>78</sup> That part of the Act provides that the local authority shall have the power to acquire any land, either by agreement or compulsorily, subject to confirmation by the Minister of Health, as a site for the erection of such houses. This broad power is, however, subject to certain exceptions contained in Section 75 of the Act. "Nothing in this Act shall authorise the compulsory acquisition for the purposes of this Part of this Act of any land which is the property of any local authority, or which is the property of statutory undertakers, having been acquired by them for the purposes of their undertaking, or which at the date of the compulsory purchase order forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house." The administrative finding on any one of these points, that a particular piece of land does not come within any of these exceptions, is, it is true, basically one of fact. But the existence of that fact, as found administratively, is one upon which the administrative power to act depends. The question whether the particular land does fall within the exceptions is preliminary to the exercise of the administrative jurisdiction to make or confirm the compulsory purchase order. An inferior tribunal or body cannot give itself jurisdiction by wrongly deciding a question of fact which arises as a preliminary question before it begins to exercise its jurisdiction.<sup>79</sup> If the land at issue does come within one of the exceptions contained in Section 75, then the local authority and the Minister of Health cannot give themselves jurisdiction by finding that it does not.

This was the basis of an appeal by the landowners from the confirmation by the Minister of Health of a compulsory purchase order made by the Ripon Borough Council. The land in question, it was asserted, formed part of a park and could not therefore be the subject of an order empowering compulsory purchase.

<sup>78</sup> 26 Geo. V & 1 Edw. VIII, c. 51.

<sup>79</sup> Cf. *Social Security Board v. Nierotko*, 327 U. S. 358, 369 (1946).

Neither the local authority nor the Minister could give themselves jurisdiction by wrongly deciding that it was not part of a park. The normal reluctance of the English courts to disturb administrative findings of fact, provided that the limited requirements of the "no-evidence" rule have been met, led Charles, J., to dismiss the appeal. "Where there is evidence upon which the Minister could arrive at the conclusion at which he did arrive, it is not for the Appeal Court to allow the appeal by rehearing the case and hearing evidence and considering evidence and disagreeing with the conclusion of the Minister. It is a finding of fact, and by that finding of fact I am bound."<sup>80</sup>

This holding, however, was reversed by the Court of Appeal.<sup>81</sup> The reasoning of Luxmoore, L.J., who delivered the principal opinion, is strikingly like that of Chief Justice Hughes in *Crowell v. Benson*. Basing his conclusion upon the doctrine of "jurisdictional fact," he holds that the administrative finding upon the question of whether or not the land is within the statutory exception is subject to review upon the independent judgment of the reviewing court. "The first and most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact; for, unless the land can be held not to be part of a park or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case it seems almost self-evident that the Court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this were not so, the right to apply to the Court would be illusory. . . . the decision on the question whether the particular land is part of a park or not is preliminary to the exercise of the jurisdiction to make and confirm the order con-

<sup>80</sup> *Re Ripon Housing Order*, [1939] 1 All E. R. 508, 511. *Cf. Re Newhill Compulsory Purchase Order*, [1938] 2 All E. R. 163.

<sup>81</sup> *White and Collins v. Minister of Health*, [1939] 2 K. B. 838.

ferred by the Housing Act, 1936, section 75, and is therefore open to review in this Court."<sup>82</sup>

The opinion goes even further, for the court does not limit itself to exercising its own independent judgment upon the administrative record. The appellant is entitled to a trial *de novo* upon the issue of "jurisdictional fact." The proceeding here "was not by way of appeal from any order made by the borough council or its confirmation by the Minister of Health, but was a new and independent proceeding and not a re-hearing or a re-trial. . . . The true position with regard to applications under clause 2 of the Second Schedule to the 1936 Act appears to me to be that the judge to whom the application is made is bound to consider the available evidence, whether given at the local inquiry or by the affidavits in support of or in opposition to the motion, and, if there is a conflict with regard to the facts raised, or if the evidence is insufficient to enable him to come to a conclusion, he is free to direct that oral evidence be given, whether by way of cross-examination or of additional evidence."<sup>83</sup> The court accordingly decided that the land in question was part of a park on the basis of affidavit evidence which was not before the Minister.<sup>84</sup>

The doctrine of the *White and Collins* case, like that of *Crowell v. Benson*, affords a valuable exception to the normal weight given to administrative findings of fact. The basis of judicial control of the Executive in the common-law world is the prevention of arbitrary uses of power by confining the exercise of such power within the limits delegated. Judicial review would be of little value if the Executive could finally determine the issue of its own jurisdiction merely because it turned upon

<sup>82</sup> *Id.* at 855, 856.

<sup>83</sup> *Id.* at 855, 859.

<sup>84</sup> The doctrine of "jurisdictional fact" also arises in alien deportation cases. Compare the language of Lord Atkin in *Eshugbayi Eleko. v. Government of Nigeria*, [1931] A. C. 662, 670, with *Ng Fung Ho v. White*, 259 U. S. 276 (1922).

a question of fact. To use the argument of the Supreme Court on a related issue in *St. Joseph Stock Yards Co. v. United States*:<sup>85</sup> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."

<sup>85</sup> 298 U. S. 38, 52 (1936).

## CHAPTER IX

### EXECUTIVE POWER IN EMERGENCY

It is almost a truism that "in a modern state there are many occasions when there is a sudden need of legislative action. For many such needs delegated legislation is the only convenient or even possible remedy."<sup>1</sup> The necessity to cope with conditions of emergency leads to the granting of unprecedented powers to the Executive. But if the authority granted is enormous, it is thought of as justified by the need of the State to preserve itself, even at the cost of some constitutional doctrines. The latter must often give way if they conflict with the national necessity. "By general law life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb."<sup>2</sup>

War is the supreme national emergency. "The war power," said the Supreme Court at the height of the last conflict, "is 'the power to wage war successfully.' It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war."<sup>3</sup>

Any comparative discussion of the war power should begin

<sup>1</sup> Report of the Committee on Ministers' Powers, 52.

<sup>2</sup> 2 Works of Abraham Lincoln (1902) 508.

<sup>3</sup> *Hirabayashi v. United States*, 320 U. S. 81, 93 (1943).

with the *Milligan* case,<sup>4</sup> decided immediately after the Civil War and still the leading American case in the field. Milligan, a resident of Indiana, and not a member of the armed forces, was arrested in his home during the war and tried, convicted, and sentenced to be hanged by a military commission convened at the order of the commander of the military district of Indiana. He filed a petition for a writ of habeas corpus and the Supreme Court unanimously held that he should be discharged. During the war, Congress had authorized the President to suspend habeas corpus, provided that where a federal grand jury should meet where a prisoner was held and fail to indict him the writ might issue.<sup>5</sup> The grand jury in Milligan's district had adjourned without taking any action against him, and he thus came within the proviso of the Congressional Act. In this, all the justices agreed. Justice Davis, however, speaking for a bare majority of the Court, went further and intimated that Congress itself could not have authorized trial by military tribunal outside the actual theater of military operations. Though admitting that in general the military have the power to try members of the armed forces and civilians in the actual zone of combat, he asserted that:

"Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration . . . Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."<sup>6</sup>

However valid this test may have been in Indiana in 1866, it is submitted that it is wholly inadequate, if followed literally, to meet the needs of modern warfare; "implicit in its reasoning is the hypothesis that in the absence of actual invasion the slower

<sup>4</sup> *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866).

<sup>5</sup> 12 Stat. 755 (1863).

<sup>6</sup> 4 Wall. at 127.

and more deliberate procedures of the civil courts are a sufficient protection from disloyal citizens lending aid to the enemy;... the possibility of air invasion covering the state of Indiana in less than two hours was not even 'lurking' in the minds of the Justices."<sup>7</sup> The great differences between conditions then and at the present time are self-evident, but their mere consideration shows that, if the majority test were in every case strictly to be applied, the State would be greatly impeded in the successful prosecution of a war.

"In the Civil War when Milligan was tried by military commission no invasion could have been expected into Indiana except after much prior notice and weary weeks of slow and tedious gains by a slowly advancing army. They then never imagined the possibility of flying lethal engines hurtling through the air several hundred miles within an hour. They never visioned the possibility of far distant forces dispatching an air armada that would rain destroying parachutists from the sky and capture far distant territory overnight. They never had to think then of fifth columnists far, far from the forces of the enemy successfully pretending loyalty to the land where they were born, who, in fact, would forthwith guide or join any such invaders."<sup>8</sup>

Every sovereign State must, of necessity, possess the power of self-preservation. "The government," Justice Davis, himself, admitted, "within the Constitution, has all the powers granted to it which are necessary to preserve its existence."<sup>9</sup> It surely need not wait until hostile forces have actually invaded American soil before being able to take drastic action to preserve such existence. More adequate to needs today is the concurring opinion of Chase, C.J., which asserted that Congress had the power to authorize Milligan's trial by military commission:

<sup>7</sup> *Toyosaburō Korematsu v. United States*, 140 F. (2d) 289, 296 (C. C. A. 9th, 1943).

<sup>8</sup> *Ex parte Ventura*, 44 F. Supp. 520, 522 (W. D. Wash. 1942).

<sup>9</sup> 4 Wall. at 121.



"... when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety."<sup>10</sup>

Direct issue is thus taken with the majority on the extent of Congressional power.

Much of the harm that may be done by an inveterate, literal application of the test of the majority can be avoided by expanding the concept of "the locality of actual war" in line with its actual expansion in fact since 1866. Thus, after the First World War, a federal court held that New York City was within "the field of active operations" and upheld the trial by court-martial of a spy apprehended there.<sup>11</sup> A like expansion of the "necessity" calling forth martial law would lead to a similar result. "Since 'necessity creates the [martial] rule', it is not inconsistent with the principle established in the *Milligan* case that a threatened air invasion, directed by saboteur signals, which in an hour's time could destroy every federal court house in California, presents the necessity for the substitute of military action against such sabotage for that of civil courts."<sup>12</sup>

The requirement of Justice Davis that the ordinary courts be closed is also inadequate. "Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its existence, and necessity measures the extent and degree to which it may be employed."<sup>13</sup> By this test of military necessity, it would appear that martial law need not in every case suspend all civil authority, but may and should be exercised only to the limited extent which

<sup>10</sup> 4 Wall. at 140.

<sup>11</sup> *United States ex rel. Wessels v. McDonald*, 265 Fed. 754 (E. D. N. Y. 1920). Cf. *Perlstein v. United States*, 57 F. Supp. 123 (M. D. Pa. 1944).

<sup>12</sup> *Toyosaburo Korematsu v. United States*, 140 F. (2d) 289, 296 (C. C. A. 9th, 1943).

<sup>13</sup> Weiner, *A Practical Manual of Martial Law* (1940) 16.

military exigencies require.<sup>14</sup> This concept of qualified or partial martial law was severely criticized by a federal judge during the war as a "pernicious doctrine."<sup>15</sup> Much of the confusion on the subject has arisen through the misuse of the doctrine of martial rule by state governors attempting to intervene in industrial disputes by military authority exercised in the name of necessity.<sup>16</sup> But these perversions of the doctrine do not repudiate the doctrine itself. The cases of abuse and their restraint by the courts show that martial-law action is subject to constitutional limitations; they do not disprove the thesis that martial law can be qualified under the proper circumstances. It is submitted that the better rule and the one more consonant with modern conditions, especially where the Federal Government in its exercise of the war power is concerned, is that a state of martial rule can exist only to the extent which military necessity may require. It is, indeed, in most cases something less than the complete taking over of civil government, and should operate although the ordinary courts are functioning where the circumstances so require.

"What Justice Davis said in the *Milligan* opinion was a page torn from the constitutional history of England."<sup>17</sup> His requirement that the ordinary courts be closed is derived from the language of some of the earlier English cases, which held that martial

<sup>14</sup> See *Ex parte McDonald*, 49 Mont. 454, 476 (1914), where the court said: "Martial law, however, is of all gradations"; *Cox v. McNutt*, 12 F. Supp. 355 (S. D. Ind. 1935); *In re Moyer*, 35 Colo. 159 (1905); *In re Boyle*, 6 Idaho 609 (1899); *Commonwealth ex rel. Wadsworth v. Shortall*, 206 Pa. 165 (1903); *Bishop, New Criminal Law* (1892) § 53; Fairman, "Martial Law and Suppression of Insurrection" 23 Ill. L. Rev. 766, 775 (1929).

<sup>15</sup> *United States v. Minoru Yasui*, 48 F. Supp. 40, 49 (D. Ore. 1942).

<sup>16</sup> Cases dealing with this situation include *United States v. Phillips*, 33 F. Supp. 261 (N. D. Okla. 1940); *Miller v. Rivers*, 31 F. Supp. 540 (M. D. Ga. 1940); *Patten v. Miller*, 190 Ga. 105 (1940); *Hearon v. Calus*, 178 S. C. 381 (1935). For a discussion of the cases on the power of state governors to exert military authority, see Fairman, "The Law of Martial Rule and the National Emergency" 55 Harv. L. Rev. 1253, at 1267 *et seq.* (1942).

<sup>17</sup> *Id.* at 1254.

law was applicable only in time of war. The test to determine this was whether the King's courts were functioning and the King's writ could be executed. "The time of peace is when the Courts of Westminster are open." "If the Chancery and Courts of Westminster be shut up . . . it is time of war, but if the Courts be open it is otherwise; yet if war be in any part of the kingdom, that the sheriff cannot execute the king's writ, there is *tempus belli*." <sup>18</sup>

The test of the modern British cases is more elastic. The fact that the ordinary courts are in operation is not, of itself, conclusive in determining the legality of martial-law action; it is merely one of the factors to be considered in determining whether there was in fact an emergency justifying such action. "The necessity for taking action which infringes on rights of property or liberty can not depend on the fact that the courts continue or do not continue to sit: it depends on the necessity created by the presence of an enemy in the country." <sup>19</sup>

Ex parte *Marais* <sup>20</sup> arose in South Africa during the Boer War. Marais had been arrested by the military authorities on the ground that in their opinion there were military reasons for his custody. Martial law had been proclaimed in the district and those arrested were under the Martial Law Regulations to be tried by a military court. Marais contended that his detention was illegal because martial law could not arise when the ordinary courts were open. "There was no necessity alleged or shewn for bringing the petitioner before a military tribunal whilst a civil Court was sitting. The right of the Crown to resort to such an extremity as the proclamation of martial law was limited by necessity, and, if a civil Court was open, the Crown had no power to try an offender by a military one." <sup>21</sup> The Privy Council rejected

<sup>18</sup> Holdsworth, "Martial Law Historically Considered" 18 L. Q. Rev. 117, 120 (1902), quoting from 1 Hale, Pleas of the Crown, 344; Common Law, 42, 43.

<sup>19</sup> Richards, "Martial Law" 18 L. Q. Rev. 133, 141 (1902).

<sup>20</sup> [1902] A. C. 109.

<sup>21</sup> *Id.* at 111.

this contention, being of the opinion that "the fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging."<sup>22</sup> The *Marais* case thus, in the words of one commentator, "distinctly puts an end to the ancient rule, that because for some purposes the Courts are open at a place, that place must be held to be one where peace exists, no matter what the actual fact may be."<sup>23</sup>

The Lord Chancellor, however, went somewhat further, and asserted that "where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals."<sup>24</sup>

"The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.

"Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.

"It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities."<sup>25</sup>

The *Marais* case "has, no doubt, been criticized on the ground that some of the language employed in the judgment was too wide."<sup>26</sup> If the proposition asserted above by the Lord Chancellor is intended to be taken as limited to the actual facts of the case, there is probably no ground for such criticism. "But if it is intended thereby to affirm that military authorities cannot in any case when the war is ended be sued for acts of violence

<sup>22</sup> *Id.* at 114.

<sup>23</sup> Dodd, "The Case of *Marais*" 18 L. Q. Rev. 143, 147 (1902).

<sup>24</sup> [1902] A. C. at 114.

<sup>25</sup> *Id.* at 115.

<sup>26</sup> *Rex v. Allen*, [1921] 2 I. R. 241, 270.

inflicted upon citizens during war, or done to their property whilst hostilities are raging, then it is a proposition at variance with what has long been, and what is still believed to be, the law.”<sup>27</sup>

Likewise, any intimation from the Lord Chancellor’s language that martial-law action is beyond *any* judicial control must be discounted. The holding of the *Marais* case must be limited to the proposition that “where a state of war exists the civil Courts have no jurisdiction to interfere with the proceedings of the military authority.”<sup>28</sup> But this does not mean that the lack of judicial jurisdiction continues after the war emergency has ceased. “After the war is over persons may be made liable, civilly and criminally, for any acts which they are proved to have done in excess of what was reasonably required by the necessities of the case—unless these acts have in the meantime been covered by an Act of Indemnity.”<sup>29</sup>

Even more important is the fact that it is for the court to determine whether there exists such a state of war as will deprive it of its jurisdiction under the *Marais* rule. The court must decide on its own judgment whether there was such an emergency as would justify the application of martial law. In making its decision on this, the court is not precluded by the Executive proclamation of necessity; the latter is merely one of the evidentiary factors to be taken account of. “The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not.”<sup>30</sup> And this question, as we have indicated, is for the court to determine when the propriety of martial-law action is raised before it. As stated by an Irish court in a case arising out of the Irish rebellion: “The Court is bound, when its jurisdiction is invoked, to decide whether or not

<sup>27</sup> Dodd, *supra* note 23, at 148.

<sup>28</sup> *Re Clifford and O’Sullivan*, [1921] 2 A. C. 570, 579.

<sup>29</sup> *Rex v. Allen*, [1921] 2 I. R. 241, 264.

<sup>30</sup> *Tilonko v. Attorney-General of Natal*, [1907] A. C. 93, 94.

there exists a state of war or armed rebellion; . . . The issue then in all these cases is whether there is or is not that deliberate, organized resistance by force and arms to the laws and operations of the lawful Government, amounting to war or armed rebellion, which justifies what is sometimes called martial law."<sup>31</sup> Yet, even with this limitation, a wide range is given to the Executive power, for once the court decides that a state of war exists, "it has no power to prohibit, control, or interfere with any act of the military forces, whether it is a matter of detention, . . . or the execution of a capital sentence after trial by a so-called military Court, . . . or the execution of a person without trial."<sup>32</sup> As stated in the *Marais* case: "Once let the fact of actual war be established, and . . . the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities."<sup>33</sup>

The British courts have from an early time given the widest scope to the war power. Based upon the vast residue of power implied in the term "prerogative," the war powers of the Government have been interpreted to include the authority to take all measures necessary to wage war successfully. The supremacy of the war power over person and property is early conceded; "when enemies come against the realm to the sea coast it is lawful to come upon my land adjoining to the same to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And, therefore, by the common law, every man may come upon my land for the defence of the realm."<sup>34</sup> Even counsel for Hampden in the famous "*Ship-*

<sup>31</sup> *Rex (O'Brien) v. Military Governor*, [1924] 1 I. R. 32, 38.

<sup>32</sup> *Ibid.* Other Irish cases in point are *Rex (Johnstone) v. O'Sullivan*, [1923] 2 I. R. 13; *Rex (Ronayne and Mulcahy) v. Strickland*, [1921] 2 I. R. 333; *Rex (Garde) v. Strickland*, [1921] 2 I. R. 317.

<sup>33</sup> [1902] A.C. at 115.

<sup>34</sup> *King's Prerogative in Saltpetre* (1606), 12 Co. Rep. 12. See *Malverer v. Spinke* (1538), 1 Dyer 35b, 36b; *Magdalen College Case* (1615), 11 Co. Rep. 66b.

*Money*" case<sup>35</sup> concedes that the rights of the subject can be subordinated in time of war to the public interest, saying:

"My Lords, in these times of war I shall admit not only His Majesty but likewise every man that hath power in his hands may take the goods of any within the realm, pull down their houses or burn their corn to cut off victuals from the enemy, and do all other things that conduce to the safety of the kingdom without respect had to any man's property."<sup>36</sup>

The powers exercised by the British Government in the First and Second World Wars have been of the broadest nature. The established supremacy of Parliament enables it to take any measures it deems necessary to cope with the emergency. The constitutional problem of delegations to the Executive cannot, of course, arise in the American sense, for whatever powers Parliament itself possesses it may confer upon others. The function of the judiciary under the English system is reduced to one of interpretation. The courts cannot control the delegation; they can only see to it that the Executive remains within the bounds of the powers conferred. As the powers delegated, under the stress of total war, have become more sweeping, with fewer restrictions imposed upon Executive discretion, the judicial power to declare Executive action *ultra vires* of the enabling legislation has become of less importance. The statutes have been drawn so broadly as to include practically all action taken.

The basic legislation of the First World War, from which most of the powers exercised during that conflict flowed, was the Defence of the Realm Act, 1914<sup>37</sup>—better known as D.O.R.A.—whose provisions were broadened in a later statute of the same year.<sup>38</sup> "His Majesty in Council" was given the "power during the continuance of the present war to issue regulations for

<sup>35</sup> *Rex v. Hampden* (1683), 3 State Tr. 824.

<sup>36</sup> See Richards, *supra* note 19, at 135.

<sup>37</sup> 4 & 5 Geo. V, c. 8.

<sup>38</sup> Defence of the Realm Consolidation Act, 1914, 5 & 6 Geo. V, c. 8.

securing the public safety and the defence of the realm." The Act went on to provide that "His Majesty may by such regulations authorise the trial and punishment of persons committing offences against the regulations and especially against regulations designed for any of the purposes enumerated under heads (a), (b), (c), (d), and (e). These heads comprise the prevention of communication with the enemy, securing the safety of His Majesty's forces and means of communication, and of railways, ports, and harbours, preventing the spread of false rumours, and the prevention of assistance to the enemy and the successful prosecution of the war being in danger."<sup>39</sup>

The Defence of the Realm Regulations, promulgated under the authority of this Act, enabled the Government to exercise the minutest and most detailed control over every phase of the war effort. These "regulations made by the King in Council have all the force of a statute, and may take away a statutory privilege or impose a statutory obligation."<sup>40</sup> A glance at the cases shows the tremendous scope of the powers exercised. Requisition and control of food,<sup>41</sup> ships,<sup>42</sup> and war materials,<sup>43</sup> coal<sup>44</sup> and liquor control,<sup>45</sup> price fixing,<sup>46</sup> restrictions on build-

<sup>39</sup> Lord Finlay, L.C., in *Rex v. Halliday*, [1917] A. C. 260, 265.

<sup>40</sup> *Ernest v. Commissioner of Metropolitan Police* (1919), 89 L. J. K. B. 42, 45.

<sup>41</sup> *Swift & Co. v. Board of Trade*, [1925] A. C. 520; *Robinson & Co. v. Rex*, [1921] 3 K. B. 183; *Gurney v. Houghton* (1920), 123 L. T. R. 706; *Welch v. Russell* (1918), 87 L. J. K. B. 1038; *Campbell v. Spears* (1918), 120 L. T. R. 90.

<sup>42</sup> *Hudson's Bay Co. v. Maclay* (1920), 36 T. L. R. 469; *China Mutual Steam Navigation Co. v. Maclay*, [1918] 1 K. B. 33; *cf. Crown of Leon v. Admiralty Commissioners*, [1921] 1 K. B. 595.

<sup>43</sup> *Robinson & Co. v. Rex*, [1921] 3 K. B. 183; *Lipton, Ltd., v. Ford*, [1917] 2 K. B. 647.

<sup>44</sup> *Shutler v. Rolfe* (1920), 36 T. L. R. 828; *Parry v. Puddicombe* (1918), 87 L. J. K. B. 894.

<sup>45</sup> *Whitham & Butterworth v. Lindley* (1920), 37 T. L. R. 75; *Hall-Dalwood v. Emerson* (1917), 87 L. J. K. B. 296; *Williams v. Pearce* (1916), 85 L. J. K. B. 959.

<sup>46</sup> *Fowle v. Monsell* (1920), 90 L. J. K. B. 105; *Sainsbury v. Saunders* (1918), 89 L. J. K. B. 441; *Star Tea Co. v. Davies* (1918), 88 L. J. K. B. 192.



ings,<sup>47</sup> seizure and destruction of prohibited documents,<sup>48</sup> restriction on communication or publication of information useful to the enemy,<sup>49</sup> and restrictions on personal freedom<sup>50</sup> have all been sustained as within the power conferred by the Defence of the Realm Act.

*Rex v. Halliday*; *ex parte Zadig*<sup>51</sup> is a leading case illustrating the judicial attitude. Regulation 14 B of the Defence of the Realm Regulations empowered the Secretary of State to order the internment of any person "of hostile origins or associations" where on the recommendation of a competent naval or military authority it appeared to him expedient for securing the public safety or defense of the realm. Petitioner, a naturalized British subject of German birth, who had been interned by an order made under 14 B, sought a writ of habeas corpus, contending that Parliament had not conferred the authority to make such an order. The Defence of the Realm Act did not specifically delegate the power to make regulations authorizing detention without trial. The House of Lords, however, held that it was included by implication in the over-all authority granted "to issue regulations for securing the public safety and the defence of the realm." The question for their lordships was not one of power but of interpretation; "the power of Parliament to authorize such a proceeding was not and could not be disputed. The only question is as to the construction of the Act."<sup>52</sup> The chal-

<sup>47</sup> *Brightman & Co. v. Tate*, [1919] 1 K. B. 463; *Director of Public Prosecutions v. Ford* (1918), 35 T. L. R. 206.

<sup>48</sup> *Norman v. Mathews* (1916), 85 L. J. K. B. 857; *Ex parte Norman* (1915), 85 L. J. K. B. 203.

<sup>49</sup> *Fox v. Spicer* (1917), 86 L. J. K. B. 580; *Rex v. Kuepferle* (1915), 31 T. L. R. 461; *Ex parte Dyson* (1915), 31 T. L. R. 425.

<sup>50</sup> *Rex v. Halliday*, [1917] A. C. 260; *Rex v. Superintendent of Vine Street Police Station*, [1916] 1 K. B. 268; *Michaels v. Block* (1918), 34 T. L. R. 438; *Ex parte Howsin* (1917), 33 T. L. R. 527; *Rex v. Denison* (1916), 85 L. J. K. B. 1744.

<sup>51</sup> [1917] A. C. 260.

<sup>52</sup> *Id.* at 268.

lenged regulation was a proper exercise of the power conferred. "The statute was passed at a time of supreme national danger, which still exists. The danger of espionage and of damage by secret agents to ships, railways, munitions works, bridges, &c., had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases."<sup>53</sup> Nor does the fact that the personal liberty of the subject is invaded of itself invalidate the Executive action. "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement."<sup>54</sup>

The Lord Chancellor goes still further, indicating that the action of the Executive is not subject to judicial control. "One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. It is to this that reg. 14 B is directed. The measure is not punitive but precautionary. It was strongly urged that no such restraint should be imposed except as the result of a judicial inquiry, and indeed counsel for the appellant went so far as to contend that no regulation could be made forbidding access to the seashore by suspected persons. It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law."<sup>55</sup>

"It would be a mistake, however, to suppose that at this critical time *inter arma leges silebant*. Some great constitutional battles were fought and some great constitutional principles were

<sup>53</sup> *Id.* at 270.

<sup>54</sup> *Id.* at 271, per Lord Atkinson.

<sup>55</sup> *Id.* at 269.

asserted.”<sup>56</sup> Executive action was quashed as *ultra vires* even at critical periods of the conflict. Thus, at the height of the sea war, Bailhache, J., held that an order of the Shipping Controller requisitioning the services of plaintiff shipowners and their staffs was ‘illegal; the power given under a Defence Regulation to requisition ships did not include the asserted power. “The scheme requisitioned three things—the ships, the owners’ services, the profits; and the question to be determined is whether such a scheme, intended to be obligatory throughout, is within the powers conferred upon the Shipping Controller. The answer is to be sought in reg. 39 BBB, where alone his powers are to be found. A close examination of that regulation has convinced me that it contains no powers to requisition the services of the owners. Indeed, the Attorney-General towards the close of his argument admitted that such was the case. The scheme, therefore, is *ultra vires* in its second essential respect, and the order of March 5 cannot be supported.”<sup>57</sup>

In *Chester v. Bateson*,<sup>58</sup> the Divisional Court invalidated a regulation which provided that “no person shall, without the consent of the Minister of Munitions, take, or cause to be taken, any proceedings for the purpose of obtaining an order or decree for the recovery of possession, or for the ejectment of a tenant of, any dwelling-house” in which a munition worker was living, and which was in an area declared by the Minister of Munitions to be a “special area.” This restriction upon the subject’s normal right of action was held not to be authorized even by the broad language of the Defence of the Realm Act, for the power to impose it was not expressly conferred. “In my opinion,” said Avory, J., “there is not to be found in the statute anything to authorize or justify a regulation having that result; and nothing

<sup>56</sup> Allen, *Law and Orders* (1945) 36.

<sup>57</sup> *China Mutual Steam Navigation Co. v. Maclay*, [1918] 1 K. B. 33, 40. Cf. *Russian Bank for Foreign Trade v. Excess Insurance Co., Ltd.*, [1918] 2 K. B. 123.

<sup>58</sup> [1920] 1 K. B. 829.

less than express words in the statute taking away the right of the King's subjects of access to the Courts of justice would authorize or justify it."<sup>59</sup> The right of access to the courts is a fundamental right which cannot be abrogated by Executive action. "It is to be observed that this regulation not only deprives the subject of his ordinary right to seek justice in the Courts of law, but provides that merely to resort there without the permission of the Minister of Munitions first had and obtained shall of itself be a summary offence, and so render the seeker after justice liable to imprisonment and fine. I allow that in stress of war we may rightly be obliged, as we should be ready, to forgo much of our liberty, but I hold that this elemental right of the subjects of the British Crown cannot be thus easily taken from them."<sup>60</sup>

Avory, J., goes even further, asserting that "if the question had to be determined as a question of constitutional law I should agree that this regulation is in conflict with, and in violation of, the provisions of Magna Carta, cc. 39 and 40; of the Bill of Rights . . . ; and . . . of the Statute of Northampton."<sup>61</sup> As Sir Cecil Carr has pointed out: "We seem here to be on the edge of a judicial pronouncement that there are certain fundamental rights which legislation cannot diminish—the American rather than the British doctrine."<sup>62</sup> The judicial assertion here cannot, therefore, be taken as an accurate statement of English law, however much one may sympathize with the judge's desire to assert certain constitutional rights which even the legislature cannot abrogate.

The basis for the invalidation of the regulation at issue in *Chester v. Bateson* is the judicial conclusion that it is not "a necessary, or even reasonable, way to aid in securing the public

<sup>59</sup> *Id.* at 836.

<sup>60</sup> *Id.* at 834.

<sup>61</sup> *Id.* at 836.

<sup>62</sup> Concerning English Administrative Law (1941) 87.

safety and the defence of the realm.”<sup>63</sup> It may be that, in its holding on the merits, the court goes too far. The test in these cases, as we shall see, is not what the reviewing court thinks reasonable or necessary, but whether or not there was a reasonable basis for the Executive action. Judged in this light, a regulation concerned with the housing of munition workers bears a close enough relation to the war effort to be sustained. The importance of *Chester v. Bateson* lies not in its immediate holding, however, but in its indication of the zealotry of the English courts during the First World War to protect the rights of the subject, even during the stress of the war emergency.<sup>64</sup>

The powers conferred upon the Executive in Britain during the recent conflict were even broader than those exercised during the First World War. It will be recalled that the Defence of the Realm Act, 1914, provided that “His Majesty in Council has power, during the continuance of the present war, to issue regulations for securing the public safety and the defence of the realm.” Under this objective standard, some room was left for the courts to decide whether a challenged regulation did in fact have a reasonable tendency to secure such result. The corresponding legislation of the Second World War, the Emergency Powers (Defence) Act, 1939,<sup>65</sup> provided:

“Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations (in this Act referred to as Defence Regulations) *as appear to him to be necessary or expedient* for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.”

<sup>63</sup> [1920] 1 K. B. at 833.

<sup>64</sup> Other cases showing this are *Wilts v. United Dairies, Ltd.* (1922), 91 L. J. K. B. 897 (H. L.); *Attorney-General v. De Keyser's Royal Hotel*, [1920] A. C. 508; *The Zamora*, [1916] 2 A. C. 77; *Newcastle Breweries, Ltd., v. Rex*, [1920] 1 K. B. 854. Cf. *Marshall Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343.

<sup>65</sup> 2 & 3 Geo. VI, c. 62, § 1 (1). (Italics added.)

The standard here was subjective, and the power of the courts to decide whether a regulation was necessary or expedient was thus removed. "This is the governing principle, and it clearly places *ultra vires* in a condition of catalepsy, for how can it ever be shown that a certain measure did not *appear* to the rule-making authority to be necessary or expedient?"<sup>66</sup>

This Act did, however, contain an important limitation in Section 1 (5), which provided that the powers conferred did not authorize the making of Defence Regulations imposing any form of compulsory military service or industrial conscription or the trial of civilians by courts-martial. The Emergency Powers (Defence) Act, 1940,<sup>67</sup> enacted in May of that year at a critical period of the war, dealt with the first of these exceptions. Under it, the powers conferred by the 1939 Act were extended to "include power by Order in Council to make such Defence Regulations making provision for requiring persons to place themselves, their services, and their property at the disposal of His Majesty, as appear to him to be necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order, or the efficient prosecution of any war in which His Majesty may be engaged, or for maintaining supplies or services essential to the life of the community."<sup>68</sup>

The second exception in the 1939 Act, that against trying civilians by courts-martial, was relaxed in so far as enemy aliens were concerned by the Treachery Act, 1940.<sup>69</sup> The Emergency Powers (Defence) (No. 2) Act, 1940,<sup>70</sup> passed on August 1, 1940, when the threat of invasion was acute, authorized the setting up by Defence Regulations of special courts "where by reason of

<sup>66</sup> Allen, *op. cit. supra* note 56, at 216.

<sup>67</sup> 3 & 4 Geo. VI, c. 20, § 1 (1).

<sup>68</sup> This provision extended powers already possessed, to a limited extent, by the Government under the National Service (Armed Forces) Act, 1939, 2 & 3 Geo. VI, c. 81, and the Control of Employment Act, 1939, 2 & 3 Geo. VI, c. 104.

<sup>69</sup> 3 & 4 Geo. VI, c. 21, § 2 (b). There was, of course, also a prerogative right to intern enemy aliens. *Rex v. Bottrill*, [1947] K. B. 41.

<sup>70</sup> 3 & 4 Geo. VI, c. 45.

recent or immediately apprehended enemy action the military situation is such as to require that criminal justice should be administered more speedily than would be practicable by the ordinary courts." This Act was followed by regulations empowering the Minister of Home Security to establish such War Zone Courts.<sup>71</sup> Although the courts contemplated were expressly stated in the Act as "not being courts martial," they seem to come close to the character of military tribunals. As put by one observer, they are in "what may be called the 'no man's land' between ordinary judicial administration and 'martial law.'" <sup>72</sup>

The powers conferred by the Emergency Powers (Defence) Acts, 1939 and 1940, were thus much broader than those granted under the analogous legislation of the First World War. In addition, these Acts seem to have been expressly framed to meet certain difficulties encountered under the looser legislation of the earlier conflict. Thus, the Defence of the Realm Act, 1914, did not expressly authorize the subdelegation of the powers conferred. Although subdelegation was practiced on a large scale during the 1914-1918 war, doubts have been expressed regarding its *vires* in the absence of express authorization. Possible uncertainties on this score were taken care of in the 1939 Act by the insertion of a specific provision empowering such persons as might be prescribed in the Defence Regulations to make orders, rules, and by-laws for any purpose for which regulations could be made by an Order in Council.<sup>73</sup>

Likewise, attempts were made to meet the effect of some of the judicial decisions during the earlier war. In *Wilts v. United*

<sup>71</sup> Defence (War Zone Courts) Regulations, 1940, S. R. and O. No. 1444.

<sup>72</sup> Jennings, Emergency Legislation, in *Annual Survey of English Law* (1940) 14. The military situation, fortunately, never became so serious as to necessitate the formation of these courts. *Cf.* *Chittambaram v. King Emperor*, [1947] A. C. 200.

<sup>73</sup> § 1 (3). For an example of such subdelegation, see *Carlsh v. East Ham Corp.*, [1948] 2 All E. R. 550. *Cf.* *Allingham v. Minister of Agriculture*, [1948] 1 All E. R. 780.

*Dairies, Ltd.*,<sup>74</sup> the House of Lords held that the Food Controller had acted illegally in imposing a charge of 2d. per gallon as a condition of granting milk dealers a license to buy milk imported from another area. Section 2 of the Emergency Powers (Defence) Act, 1939, dealt with this situation by expressly conferring the power held *ultra vires* in the *Wilts* case. "The Treasury may by order provide for imposing and recovering, in connection with any scheme of control contained in or authorised by Defence Regulations, such charges as may be specified in the order." Such orders had to be laid before the House of Commons and were to cease to have effect after twenty-eight days unless approved by a resolution of the House.<sup>75</sup>

But though the authority granted by the Acts of 1939 and 1940 were very wide, there were still certain restrictions upon the power of the Executive. In the first place, the purposes for which Defence Regulations could be issued were not unlimited. They could only be issued for securing the general purposes enumerated in Section 1 of the 1939 Act. It is true that, as we have seen, the standard of necessity or expediency here was subjective, thus removing the Executive action from judicial control under the *ultra vires* doctrine. This is not to say, however, that the Executive power was not limited at all by the purposes specified. Though these purposes were broad enough to include all measures that bore any rational relation to the war effort, there was still a limited sphere to which they did not extend. Thus, to quote Dr. Jennings' example, "changes in the social services or other sections of peace-time government can therefore

<sup>74</sup> (1922), 91 L. J. K. B. 897.

<sup>75</sup> See *Yoxford and Darsham Farmers' Association v. Llewellyn* (1945), 61 T. L. R. 461. Likewise, "instead of leaving all questions of compensation for requisitioned, property, ships, and aircraft to be raised by the cumbrous and esoteric procedure of petition of right as in the *De Keyser's Hotel* case ([1920] A. C. 508), a simple statutory remedy was provided by a Defence (Compensation) Act (2 & 3 Geo. VI, c. 75, 1939), which set up two tribunals for assessing payments." Carr, *op. cit. supra* note 62, at 74.



be made only by Parliament, unless they are made for one of these purposes."<sup>76</sup>

Then too, for what it was worth, there was the check provided by the provision in the 1939 Act for the laying of Defence Regulations subject to annulment by negative resolution. We have already discussed some of the limitations in this method of Parliamentary control,<sup>77</sup> and they apply with perhaps even greater force here. Yet this provision did provide some check and one that was not present in the corresponding Act of 1914.

Even more important was the fact that the Emergency Powers (Defence) Acts were in force for only a limited period. The Act of 1939 was to continue in operation for one year (extended to two years by the first Act of 1940), but could be renewed for a further period of one year on each House praying that it should be so continued. The Government thus had to obtain the consent of Parliament for its prolongation. This is to be compared with the Supplies and Services (Transitional Powers) Act, 1945,<sup>78</sup> which authorizes the continuance of Defence Regulations within its purposes, and which provides that it is to continue in force for a period of five years.

In addition to those referred to above, there were two other important limitations upon the powers conferred by the Emergency Powers (Defence) Acts. Although the 1939 Act contained, as we have seen, a limited authority in the Treasury to impose charges, general financial legislation still required Parliamentary sanction; and except as provided by the Emergency Powers (Defence) (No. 2) Act, 1940, and subject to some specific powers in other legislation, no changes could be made in the ordinary judicial system otherwise than by act of Parliament.<sup>79</sup> Yet, even with the restrictions mentioned, when all is said and done, the

<sup>76</sup> *Supra* note 72, at 10.

<sup>77</sup> *Supra* p. 111 *et seq.*

<sup>78</sup> 9 & 10 Geo. VI, c. 10.

<sup>79</sup> Jennings, *supra* note 72, at 11. Cf. *Adel Muhammed El Dabbah v. Attorney-General for Palestine*, [1944] A. C. 156.

power conferred was still tremendous in scope, giving the Executive, as it did, control over all phases of national life related to the war effort.

The specific powers that were granted by Parliament, under the stress of the war emergency are too sweeping to be discussed at any length. Some idea of the Parliamentary response to the emergency may be gathered merely from a glance at the titles of some of the more important legislation passed just prior to and at the beginning of the conflict:

Reserve and Auxiliary Forces Act;<sup>80</sup> Civil Defence Act;<sup>81</sup> Ministry of Supply Act;<sup>82</sup> War Risks Insurance Act;<sup>83</sup> Currency (Defence) Act;<sup>84</sup> Prize Act;<sup>85</sup> Courts (Emergency Powers) Act;<sup>86</sup> Import, Export and Customs Powers (Defence) Act;<sup>87</sup> Ships and Aircraft (Transfer Restriction) Act;<sup>88</sup> Rent and Mortgage Interest Restrictions Act;<sup>89</sup> Landlord and Tenant (War Damage) Act;<sup>90</sup> Housing (Emergency Powers) Act;<sup>91</sup> Essential Buildings and Plants (Repair of War Damage) Act;<sup>92</sup> National Service (Armed Forces) Act;<sup>93</sup> Personal Injuries (Emergency Provisions) Act;<sup>94</sup> Navy and Marines (Wills) Act;<sup>95</sup> Trading with the Enemy Act;<sup>96</sup> National Registration Act;<sup>97</sup> Control of Employment Act;<sup>98</sup> Patents, Designs, Copyright and Trade Marks (Emergency) Act;<sup>99</sup> Execution of Trusts (Emergency Provisions) Act;<sup>100</sup> National Loans Act;<sup>101</sup> Prices of Goods Act.<sup>102</sup>

These war statutes covered every phase of national activity; Parliament in its exercise of the war power had indeed done "all things that conduce to the safety of the kingdom without respect had to any man's property," or (one might add) person.

Even broader in scope were the Defence (General) Regulations made by virtue of the Emergency Powers (Defence) Acts, and the orders, rules, and bylaws promulgated under them. A first

<sup>80</sup> 2 & 3 Geo. VI, c. 24 (1939).

<sup>81</sup> *Id.*, c. 31.

<sup>82</sup> *Id.*, c. 65.

<sup>83</sup> *Id.*, c. 71.

<sup>84</sup> *Id.*, c. 81.

<sup>85</sup> *Id.*, c. 91.

<sup>101</sup> *Id.*, c. 117.

<sup>82</sup> *Id.*, c. 38.

<sup>86</sup> *Id.*, c. 67.

<sup>87</sup> *Id.*, c. 72.

<sup>88</sup> *Id.*, c. 82.

<sup>89</sup> *Id.*, c. 104.

<sup>102</sup> *Id.*, c. 118.

<sup>83</sup> *Id.*, c. 57.

<sup>87</sup> *Id.*, c. 69.

<sup>91</sup> *Id.*, c. 73.

<sup>95</sup> *Id.*, c. 87.

<sup>100</sup> *Id.*, c. 107.

<sup>84</sup> *Id.*, c. 64.

<sup>88</sup> *Id.*, c. 70.

<sup>92</sup> *Id.*, c. 74.

<sup>96</sup> *Id.*, c. 89.

<sup>100</sup> *Id.*, c. 114.

set of Defence Regulations was laid before Parliament shortly after the passing of the 1939 Act. An Order in Council made soon afterwards amending these regulations was strongly opposed by many on the ground that some of the new regulations introduced encroached unduly on the liberty of the subject.<sup>103</sup> A debate held on a motion praying for the annulment of the Order on October 31, 1939, showed that many M.P.'s were strongly opposed to the new regulations, as they then stood. The House seemed to be quite generally of the opinion expressed by Mr. Herbert Morrison that "the wording of some of the regulations is so wide and sweeping that the House ought not to contemplate them lightly."<sup>104</sup> The opposition to the regulations proved, indeed, to be so widespread that Sir Samuel Hoare, the then Lord Privy Seal, acting on behalf of the Government, offered members on all sides of the House the opportunity of consultation with the Government with a view toward the drawing up of regulations on which there would be general agreement. This proposal was agreed to by all sides, and the regulations were subsequently amended by the Home Secretary after consultations with an informal committee of M.P.'s representing all political parties. Many of the original regulations were thus substantially modified<sup>105</sup> but, as Dr. Allen points out, "it turned out to be regrettable that there was no complete record of this unofficial conference,"<sup>106</sup> for misunderstandings have arisen with regard to at least one regulation—18 B—regarding just what changes, if any, were made by the seemingly substantial modifications.

The Defence Regulations, as revised and amended, were couched in the most sweeping terms, their usual form being to authorize the appropriate official to issue any order with regard

<sup>103</sup> Letter of the National Council for Civil Liberties, *The Times* (London), Oct. 31, 1939, p. 7, col. 5.

<sup>104</sup> 352 H. C. Deb. 5s., col. 1848.

<sup>105</sup> There is a good analysis of some of the more important of these in *The Times* (London), Nov. 29, 1939, p. 9, col. 6.

<sup>106</sup> *Op. cit. supra* note 56, at 208.

to the subject matter of the regulation which he deemed expedient—not in any way limiting the scope or form of the order.<sup>107</sup> Though they covered every subject that could be deemed in any way related to the war effort, they were but a general framework for the detailed instruments of control—the myriad of further regulations, orders, directions, etc., issued under them. The hierarchy of Executive sublegislation—under which control was exercised over every phase of national life—thus became that described by the Select Committee on Statutory Instruments: (a) the statute; (b) the Defence Regulations made under the statute; (c) the orders made under the Defence Regulations; (d) directions made under the orders; and (e) licenses issued under the directions.<sup>108</sup> “More than ten thousand regulations, rules and orders have been issued during the war. The number of directions is countless.”<sup>109</sup>

The English courts have gone even further in sustaining Executive action during the Second World War than they did in the earlier conflict. The cases that follow should be compared with those arising out of the First World War, which delimited the scope of Executive action, like *Chester v. Bateson*. Indeed, it is difficult to see how the courts could have limited Executive action during the recent war in view of the broad language of the Emergency Powers (Defence) Acts, and especially of those

<sup>107</sup> Their main subdivisions were:

*Part I*—Provisions for the security of the State (Interference with Essential Services; Assisting the Enemy and Sabotage; Safeguarding Information Useful to an Enemy; Control of Means of Communication; Access to Certain Premises and Areas; Restrictions on Movements and Activities of Persons);

*Part II*—Public Safety and Order;

*Part III*—Ships and Aircraft;

*Part IV*—Essential Supplies and Work (General Provisions; Agriculture and Fisheries; Housing; Transport; Import, Export, and Customs Powers; Supplementary Provisions);

*Part V*—General and Supplementary Provisions.

<sup>108</sup> Third Special Report (1946).

<sup>109</sup> Allen, *op. cit. supra* note 56, at 215.

provisions directed against the limitations encountered during the 1914-1918 war.

Defence Regulation 60 E extended a statute dealing with patents registered in enemy names to those registered in the names of British subjects. Appellants in *Rex v. Comptroller General of Patents; ex parte Bayer Products, Ltd.*,<sup>110</sup> attacked the regulation as not authorized by the Emergency Powers (Defence) Act, 1939, contending that it "was not necessary or expedient for securing the public safety, or any of the other purposes mentioned in the Act."<sup>111</sup> The Court of Appeal, however, pointed to the language of the statute in rejecting this contention; "the effect of the words 'as appear to him to be necessary or expedient' is to give His Majesty in Council a complete discretion to decide what regulations are necessary."<sup>112</sup>

"In my view," said Lord Justice Clauson, "this court has no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the regulation. The legislature has left the matter to His Majesty and this court has no control over it. I know of no authority which would justify the court in questioning the decision which His Majesty must be taken to have stated that he has come to, namely, that this regulation is necessary or expedient for the specified purposes. If His Majesty once reaches that conclusion with regard to a regulation, that regulation, when made, is the law of the land, subject to the provision in the Act that, if either House of Parliament takes a view differing from that on which His Majesty has acted, the order can be annulled."<sup>113</sup>

The oft-discussed regulation 18 B was the recent war's equivalent of that upheld in *Rex v. Halliday* during the First World

<sup>110</sup> [1941] 2 K. B. 306.

<sup>111</sup> *Id.* at 314.

<sup>112</sup> *Id.* at 311.

<sup>113</sup> *Id.* at 315.

War. The original regulation 18 B gave the Secretary of State power to detain any person whenever he was satisfied that it was necessary for him to do so. The power delegated by this regulation was strongly attacked in the debate of October 31, 1939, discussed above, and it was one of the regulations that was amended as a result of the consultation by the Government with the informal committee of members. The revised regulation authorized the Secretary of State to issue a detention order if he "has reasonable cause to believe any person to be of hostile origins or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him." Any person so detained could make his objections in writing to an advisory committee set up under the regulation. It was the duty of the chairman of such committee to inform the objector of the grounds of the detention order and to furnish him with such particulars as would enable him to present his case. The Secretary of State was required to make a monthly report to Parliament regarding the action taken under the regulation, including the number of cases in which he declined to follow the advice of the advisory committee.

The now famous case of *Liversidge v. Anderson*<sup>114</sup> was an action by a person detained against the Secretary of State for damages for false imprisonment. Appellant applied for particulars of the grounds on which the Secretary had reasonable cause to believe him a person of hostile association, over whom it was necessary to exercise control. The question for the House of Lords was whether such disclosure could be compelled or whether the order of the Secretary was conclusive proof of the legality of his action, the making of the order being left to his sole discretion. In deciding this issue, their lordships had to go into the meaning of the expression in the regulation "if the Sec-

<sup>114</sup> [1942] A. C. 206.

retary of State has reasonable cause to believe." As put by Professor Holdsworth, the point here was "whether the existence of a reasonable cause is to be proved by an objective test, *i.e.*, whether the Secretary must allege and prove facts which show the reasonableness of his belief; or whether it is to be proved by a subjective test, *i.e.*, whether the statement by the Secretary of State that he had a reasonable cause for his belief is conclusive."<sup>115</sup>

As a starting point, the power of Parliament and of King in Council acting under Parliamentary authority is conceded by all of their lordships; the question is solely one of interpretation. Even Lord Atkin, who delivered a vigorous dissent, admits this. "No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any minister with unlimited power over the person and property of the subject. The only question is whether in this regulation His Majesty has done so."<sup>116</sup>

The difference between the "objective" and "subjective" tests at issue is well put by the characterization of the latter by Lord Atkin in his dissenting opinion. Under the "subjective" test, "the words 'if the Secretary of State has reasonable cause' merely mean 'if the Secretary of State thinks that he has reasonable cause.' The result is that the only implied condition is that the Secretary of State acts in good faith. If he does that—and who could dispute it or disputing prove the opposite?—the minister has been given complete discretion whether he should detain a subject or not. It is an absolute power which, so far as I know, has never been given before to the executive."<sup>117</sup>

To Lord Atkin, the term "reasonable cause" was one that had always had a fixed and definite meaning in English law. "The plain and natural meaning of the words 'has reasonable cause'

<sup>115</sup> Note 58 L. Q. Rev. 1 (1942).

<sup>116</sup> [1942] A. C. at 239.

<sup>117</sup> *Id.* at 226.

imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed, . . . this meaning of the words has been accepted in innumerable legal decisions for many generations, . . . 'reasonable cause' for belief when the subject of legal dispute has been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal."<sup>118</sup> This standard of reasonableness is the same whatever may be the context in which the words at issue are found—whether the official involved be merely a police constable or, as in this case, "one of His Majesty's principal Secretaries of State."

It was here that the majority differed with Lord Atkin. "It is to be noted," said Viscount Maugham, "that the person who is primarily entrusted with these most important duties is one of the principal Secretaries of State, and a member of the government answerable to Parliament for a proper discharge of his duties. I do not think he is at all in the same position, as, for example, a police constable."<sup>119</sup> Although not disposed to deny the prima facie meaning of such a phrase as "if A.B. has reasonable cause to believe," his lordship asserted that that meaning could have no application to the present case. "To my mind this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law."<sup>120</sup>

The words of Lord Finlay, L.C., in the *Halliday* case on the inadequacy of a court of law to handle such questions are cited with approval. Some of the language, indeed, goes further. "But how could a court of law deal with the question whether there was a reasonable cause to believe that it was necessary to exercise

<sup>118</sup> *Id.* at 228.

<sup>119</sup> *Id.* at 222.

<sup>120</sup> *Id.* at 220.



control over the person proposed to be detained, which is a matter of opinion and policy, and not of fact? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share."<sup>121</sup> Or, as forcibly put by Lord Wright: "I cannot see any ground for holding that the performance of that duty is to be subject to the decision of a judge, who cannot possibly have the full information on which the minister has acted or appreciate the full importance in the national interest of what the information discloses . . . . These and other like considerations make Lord Finlay's observation which I quoted above, that no tribunal could be imagined less appropriate than a court of law for deciding these questions, at least as applicable to reg. 18 B as it was to reg. 14 B under the earlier statute. I might go further and say that the court is not merely an inappropriate tribunal, but one the jurisdiction of which is unworkable and even illusory in these cases."<sup>122</sup>

As a matter of statutory interpretation, it is difficult to escape from the logic of Lord Atkin's dissent. It is all very well to assert the principle that "the strictly literal method of interpretation is undesirable if it leads the Court to reach a conclusion which it is reasonably clear that Parliament could not have intended."<sup>123</sup> But that principle, in Lord Selborne's phrase, only applies "if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated,"<sup>124</sup> and it can have no application to a case like this in the face of the long-continued legislative and judicial practice set

<sup>121</sup> *Id.* at 253, per Lord Macmillan.

<sup>122</sup> *Id.* at 265-66. For a discussion of other cases arising under regulation 18 B, see Allen, *op. cit. supra* note 56, at 244 *et seq.* Under *Liversidge v. Anderson*, about the only case the courts could intervene in, if even then, was in a case of mistaken identity. See *Ex parte Sabini*, *The Times* (London), Dec. 21, 1940, p. 6, col. 3, where the applicant apparently had been confused with someone else bearing a similar name.

<sup>123</sup> Goodhart, Note 58 L. Q. Rev. 3, 4 (1942).

<sup>124</sup> *Caledonian Railway Co. v. North British Railway Co.* (1881), 6 App. Cas. 114, 122.

forth in Lord Atkin's opinion. This is shown, too, by the Parliamentary background of the challenged regulation. The change in the wording of the regulation from the requirement that the Home Secretary be merely "satisfied" to the requirement that he have "reasonable cause" surely was intended as an additional safeguard. As stated by Lord Atkin: "It is not competent to us to investigate what political reasons necessitated this change, but it is at least probable that it was made because objection had been taken to the arbitrary power and it was seen that Parliament might intervene. What is certain is that the legislators intentionally introduced the well known safeguard by the changed form of words."<sup>125</sup> "What is one to think," asks a member of the legal profession after the House of Lords decision, "of an Executive whose law officers now argue that the amended regulation means, and must have been intended to mean, precisely the same as the regulation which was withdrawn?"<sup>126</sup> No satisfactory answer has yet been given to Dr. Allen's query: If the amendment did not mean some additional and substantial power of review, is it not fair to ask what it *did* mean?<sup>127</sup> According to Lord Macmillan: "It may well be that in view of the gravity of this matter of detention it was thought right to adopt more emphatic words by way of admonition to the Secretary of State to make sure of his grounds before he took action."<sup>128</sup> This view is also that of Viscount Maugham. "It may well have been thought desirable to draw the attention of the Secretary of State to the fact that in certain cases, and, in particular, in cases in which he was considering the serious step of depriving a person of his liberty for an uncertain period, he must himself have considered whether there was reasonable cause for forming the belief which would justify his action."<sup>129</sup>

<sup>125</sup> [1942] A. C. at 237.

<sup>126</sup> The Times (London), Nov. 11, 1941, p. 5, col. 5.

<sup>127</sup> "Regulation 18 B and Reasonable Cause" 58 L. Q. Rev. 232, 238 (1942).

<sup>128</sup> [1942] A. C. at 256.

<sup>129</sup> *Id.* at 223.

Lord Wright's answer that "all that the word 'reasonable' then means is that the Minister may not lightly or arbitrarily invade the liberty of the subject"<sup>130</sup> is even more unsatisfactory. "Does the Legislature really go to the pains of introducing a solemn amendment in order to remind a Minister of the Crown of a principle which is not only within the elementary knowledge of every citizen, but which every Home Secretary, with many warning examples before him, well knows will be his political ruin if he lightly flouts it?"<sup>131</sup>

If the decision in *Liversidge v. Anderson* is to be supported at all, it must be on the basis of the war power. The fear has been expressed that the case might serve as an unwholesome precedent for the judicial control of Executive power even in peacetime. The judicial language is not confined to cases arising out of the war emergency. The subjective test applied by the House of Lords may thus well be applicable to ordinary Executive action as well. "It is difficult to see why all this psycho-analysis should not apply just as forcibly to a policeman as to a Cabinet Minister, or why the policeman should not say: 'I am required to have reasonable cause. Well, after mature reflection, I came to the conclusion that I had reasonable cause. That element was present to my mind and determined my belief and my conduct. I have satisfied the condition.' Perhaps some day, on the strength of *Liversidge v. Anderson* some enterprising counsel will have the hardihood to advance this argument in a case of false imprisonment."<sup>132</sup>

However, one may venture to doubt that an English court would decide in favor of this contention except under the pressure of a war emergency, in the light of the overwhelming mass of contrary precedents contained in Lord Atkin's dissent. The need for total power in the Executive to deal with "total" war is,

<sup>130</sup> *Id.* at 268.

<sup>131</sup> Allen, *supra* note 127, at 239.

<sup>132</sup> *Id.* at 235. Cf. Robinson v. Minister of Town and Country Planning, [1947] K. B. 702, 721.

indeed, the "inarticulate major premise" upon which the *Liversidge* decision rests. "At a time when it is the undoubted law of the land," asserts Lord Macmillan, "that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention."<sup>133</sup> Ordinary presumptions in favor of the liberty of the subject and against the grant of an unchallengeable power to the Executive can have no relevancy during such an "extraordinary" emergency. "There can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend . . . on the unchallengeable opinion of the Secretary of State."<sup>134</sup>

That the courts will sustain Executive action under the war power which in peacetime would be condemned seems clear on both sides of the Atlantic. "The validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in time of peace would be lawless."<sup>135</sup> The judicial attitude on this is well put in Mr. Justice Rutledge's dissenting opinion in *Yakus v. United States*.<sup>136</sup> "War such as we now fight calls into play the full power of government in extreme emergency. It compels invention of legal, as of martial tools adequate for the times' necessity. Inevitably some will be strange, if also life-saving, instruments for a people accustomed to peace and the normal working of constitutional limitations. Citizens must surrender or forego exercising rights which in other times could not be

<sup>133</sup> [1942] A. C. at 257.

<sup>134</sup> *Id.* at 219, per Viscount Maugham.

<sup>135</sup> Mr. Justice Frankfurter, concurring in *Korematsu v. United States*, 323 U. S. 214, 224 (1944).

<sup>136</sup> 321 U. S. 414, 461 (1944).

impaired . . . . War begets necessities . . . not required by the lesser exigencies of more normal periods."

Considerations such as these were no doubt of great weight in leading the House of Lords to interpret regulation 18 B as they did in *Liversidge v. Anderson*. Thus, after referring to the normal principles of construction, Lord Romer states that "we are dealing here with an Act passed and regulations made under it in times of a great national emergency, and in view of this circumstance and of the objects which that Act and those regulations so plainly had in view, the courts should, in my opinion, prefer that construction which is the least likely to imperil the safety of this country . . . . The context and circumstances in which they are used may force one to the conclusion that even the most familiar words and expressions are used in other than their ordinary meaning, and this is the case here."<sup>187</sup> The exigencies of war may thus force the court to a result that it would not follow in peacetime. As expressed by Lord Macmillan: "In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in war-time canons of construction different from those which they follow in peace-time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace-time measure."<sup>188</sup>

Whatever might be the position, however, with regard to the possible application of *Liversidge v. Anderson* in peacetime, its effect upon cases arising under the war power seems clear. The

<sup>187</sup> [1942] A. C. at 280-81.

<sup>188</sup> *Id.* at 251.

doctrine enunciated by the House of Lords, settling the lack of jurisdiction in the courts to review a bona fide Executive decision regarding the necessity of the challenged action, places the Executive in wartime beyond judicial control. Such an extreme view might well be justified with regard to the regulation construed by their lordships—*i.e.*, 18 B—by its great importance to the safety of the State and the dangers involved in the failure to control a fifth column. To quote Professor Laski on this almost self-evident point:

"The essence of war is the effort to break the will of your enemy. To this end, the ability to maintain national unity is essential. Total war cannot be won by a doubtful nation, by a disunited nation, by a nation in which there is any considerable part of which that is unreliable. The perspective of its psychological basis is set by the threat—in scale a new factor in war—of the Fifth Column and its potential activities. A state at war which is not fully armed against its quislings is, as the examples of Norway and Holland make manifest, already on the high road to defeat. The necessity, therefore, of concentrating immense powers in a government waging total war is beyond discussion."<sup>139</sup>

It might be contended that where the immediate danger is not so great, as in taking control over businesses or the requisitioning of property, a different rule should apply. *Point of Ayr Collieries, Ltd., v. Lloyd George*<sup>140</sup> was one of these latter type of cases. Defence Regulation 55 (4) provided:

"If it appears to a competent authority that in the interests of the public safety, the defence of the realm, or the efficient prosecution of the War, or for maintaining supplies and services essential to the life of the community, it is necessary to take control on behalf of His Majesty of the whole or any part of an existing undertaking, and that,

<sup>139</sup> "Civil Liberties in Great Britain in War Time" 2 Bill of Rights Review 243 (1942).

<sup>140</sup> [1943] 2 All E. R. 546.

for the purpose of exercising such control, it is expedient that the undertaking or part should be carried on in pursuance of an order made under this paragraph, the competent authority may by order authorise any person . . . to exercise, with respect to the undertaking or any part thereof specified in the order, such functions of control on behalf of His Majesty as may be provided by the order."

The appellants challenged the validity of an order of the Minister of Fuel and Power taking control of their collieries, introducing evidence to show that there were no adequate grounds upon which the Minister could find that it was necessary to take control. The Court of Appeal, however, followed the doctrine of the *Liversidge* case, denying the competency of a court to go into the grounds for the Minister's decision.

"If one thing is settled beyond dispute," said Lord Greene, M.R., "it is that, in construing regulations of this character, expressed in this particular form of language, it is for the competent authority, whatever Ministry that may be, to decide as to whether or not a case for the exercise of the powers has arisen. It is for the competent authority to judge of the adequacy of the evidence before it. It is for the competent authority to judge of the credibility of that evidence. It is for the competent authority to judge whether or not it is desirable or necessary to make further investigations before taking action. It is for the competent authority to decide whether the situation requires an immediate step, or whether some delay may be allowed for further investigation and perhaps negotiation. All those matters are placed by Parliament in the hands of the Minister in the belief that the Minister will exercise his powers properly, and in the knowledge that, if he does not do so, he is liable to the criticism of Parliament. One thing is certain, and that is that those matters are not within the competence of this court. It is the competent authority that is selected by Parliament to come to the decision, and, if that decision is come to in good faith, this court has no power to interfere, provided, of course, that the action is one which is

within the four corners of the authority delegated to the Minister." <sup>141</sup>

Few would dispute the necessity for conferring wide power upon the Executive to cope with the emergency of war. "From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations." <sup>142</sup> But, though not denying the need for a broad scope to be given to the war power, one may yet feel that the House of Lords went too far in *Liveridge v. Anderson* in freeing Executive action in wartime from all judicial control.

A valuable comparison can be made, here, of the American practice in an effort to determine the proper approach. On the one side is the doctrine of *Ex parte Milligan*, which has already been discussed. To cite an oft-quoted passage from that case:

"The Constitution of the United States is a Law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." <sup>143</sup>

With the desire of the Court to reassert the supremacy of the law of the land—sorely shaken under the stress of recent conflict—none will quarrel. The Court's contention is not, however, borne out by the actual American practice in wartime. "It seems to be pretty well settled by the common sense of mankind that when

<sup>141</sup> *Id.* at 547. For similar cases, see: *Progressive Supply Co., Ltd., v. Dalton*, [1943] Ch. 54; *Carltona, Ltd., v. Commissioners of Works*, [1943] 2 All E. R. 560; *Conway v. Stocks*, [1943] K. B. 438; *Horton v. Owen*, [1943] K. B. 111. In only one case has a Defence Regulation been held invalid, *Jones v. Farrell*, [1940] 3 All E. R. 608, and that decision was incorrect, in the opinion of the Court of Appeal, *Rex v. Comptroller General of Patents*, [1941] 2 K. B. 306, 316. See also *Fowler & Co. v. Duncan*, [1941] Ch. 450, where the action of a controller in charge of a business under regulation 55 was held to have exceeded his powers.

<sup>142</sup> *United States v. Macintosh*, 283 U. S. 605, 622 (1930).

<sup>143</sup> 4 Wall. 2, 120 (U. S. 1866).



for the purpose of exercising such control, it is expedient that the undertaking or part should be carried on in pursuance of an order made under this paragraph, the competent authority may by order authorise any person . . . to exercise, with respect to the undertaking or any part thereof specified in the order, such functions of control on behalf of His Majesty as may be provided by the order."

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<sup>141</sup> *Id.* at 547. For similar cases, see: *Progressive Supply Co., Ltd., v. Dalton*, [1943] Ch. 54; *Carltona, Ltd., v. Commissioners of Works*, [1943] 2 All E. R. 560; *Conway v. Stocks*, [1943] K. B. 438; *Horton v. Owen*, [1943] K. B. 111. In only one case has a Defence Regulation been held invalid, *Jones v. Farrell*, [1940] 3 All E. R. 608, and that decision was incorrect, in the opinion of the Court of Appeal, *Rex v. Comptroller General of Patents*, [1941] 2 K. B. 306, 316. See also *Fowler & Co. v. Duncan*, [1941] Ch. 450, where the action of a controller in charge of a business under regulation 55 was held to have exceeded his powers.

<sup>142</sup> *United States v. Macintosh*, 283 U. S. 605, 622 (1930).

<sup>143</sup> 4 Wall. 2, 120 (U. S. 1866).

a nation is fighting for its existence it cannot be fettered by all the legal technicalities which obtain in time of peace,"<sup>144</sup> and, accordingly, normal constitutional limitations and guaranties have had to give way when in conflict with the successful waging of war. Thus, Chief Justice Hughes, writing in 1917, states: "The power of the National Government to carry on war is explicit and supreme, and the authority thus resides in Congress to make all laws which are needed for that purpose; that is, to Congress in the event of war is confided the power to enact whatever legislation is necessary to prosecute the war with vigor and success."<sup>145</sup> Starting from this premise, he logically concludes, even with regard to such fundamental rights as those contained in the Fifth and Sixth Amendments: "Clearly, these amendments, normally and perfectly adapted to conditions of peace, do not have the same complete and universal application in time of war."<sup>146</sup> He cites as authority *Miller v. United States*,<sup>147</sup> a Civil War case upholding an act confiscating property of certain Southerners, in which the Court stated:

"The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undisputed belligerent right."<sup>148</sup>

Under the war power, Congress can grant to the Executive all the powers that may be necessary for the successful prosecu-

<sup>144</sup> Rhodes, *Historical Essays* (1909) 214.

<sup>145</sup> "War Powers under the Constitution" 42 A. B. A. Rep. 232, 239 (1917).

<sup>146</sup> *Id.* at 243. But see his later opinion in *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 426 (1933).

<sup>147</sup> 11 Wall. 268 (U. S. 1870).

<sup>148</sup> *Id.* at 304.

tion of the conflict. "The idea of restraining the legislative authority, in the means of providing for the national defence, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened."<sup>149</sup> Even the restrictions of so important a doctrine as that enunciated in the *Schechter* case<sup>150</sup>—which, as we have seen, sets important limitations upon the authority Congress may normally confer upon the Executive—do not apply to powers granted in time of war.

*Yakus v. United States*<sup>151</sup> indicates the extent to which the normal doctrine will yield under the stress of a war emergency. That case involved the validity of the Emergency Price Control Act, 1942,<sup>152</sup> against the contention that it unconstitutionally delegated to the Price Administrator the legislative power to control prices. The Administrator was given the power, when, in his judgment, commodity prices had risen or threatened to rise, "to an extent or manner inconsistent with the purposes" of the Act, to establish "such maximum price or prices as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act. The Court, through Mr. Chief Justice Stone, sustained the Act on the ground that sufficiently precise standards were prescribed to confine the Administrator's regulations and orders within fixed limits, and that judicial review was provided effectively to prohibit the transgression of those limits. The standards laid down were prescribed in Section 2 (a) directing the Administrator "so far as practicable" in establishing any maximum price to ascertain and give due consideration to prices prevailing in a specified period in 1941, but permitting him to use another period because necessary data for that specified were not available; and allowing him to "make adjustments for such relative factors as he may determine and deem to be of general

<sup>149</sup> The Federalist, No. 26 (Hamilton).

<sup>150</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935), discussed *supra* p. 27.

<sup>151</sup> 321 U. S. 414 (1944).

<sup>152</sup> 56 Stat. 23.

applicability," including several factors mentioned. To this are to be added the standards to be inferred from Section 1 (a) of the Act.

Yet, as demonstrated by the analysis in Mr. Justice Roberts' dissenting opinion, the standards here laid down are no more definite than those prescribed in the National Industrial Recovery Act. Administrative discretion is no more canalized within banks that keep it from overflowing than it was in the *Schechter* case. "Reflection will demonstrate that in fact the Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he deems a sound economy during the emergency and prevent what he considers to be a disruption of such a sound economy in the post-war period. His judgment, founded, as it may be, on his studies and investigations, as well as other economic data, even though contrary to the great weight of current opinion or authority, is the final touchstone of the validity of his action."<sup>153</sup>

One need not go as far, however, as Justice Roberts in concluding from this that the *Yakus* case "leaves no doubt that the [*Schechter*] decision is now overruled."<sup>154</sup> The cases are clearly distinguishable, for the Price Control Act was enacted to help meet the emergency of war. The broad delegation, therefore, is sustainable under the war power. Mr. Justice Rutledge points this out in his separate dissenting opinion. The Government, says he, clearly possesses the substantive power to establish nation-wide price control in wartime. "As it is with the substantive control, so it is with delegating legislative power. War begets necessities for this as for imposing substantive controls, not required by the lesser exigencies of more normal periods. In

<sup>153</sup> 321 U. S. at 451. His dissenting opinion in the companion case of *Bowles v. Willingham*, 321 U. S. 503, 529 (1944), discusses this point somewhat more fully.

<sup>154</sup> 321 U. S. at 452.

this respect certainly there is as much room for difference as exists when Congress is dealing wholly with internal matters and when it is acting with the President about foreign affairs.<sup>155</sup> Not only the broader power of Congress but its conjunction in the particular delegation with the wider authority of the President, both as chief magistrate and as commander-in-chief, goes to sustain the greater delegation."<sup>156</sup>

The war power is thus plenary in scope; it "carries with it the authority to use all means calculated to weaken the enemy and bring the struggle to a successful conclusion."<sup>157</sup> Under it, all powers that are necessary for the prosecution of the conflict may be assumed. But implicit in this is the fundamental limitation that the action taken under the war power must be *necessary* to meet the emergency; "in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, . . . It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."<sup>158</sup> Necessity is an objective standard by which Executive action can be measured. Under it, wholly arbitrary action, where the steps taken bear no relation to the emergency they are calculated to meet, can be prevented. The test of necessity also serves as a guide to limit the duration of Executive action; where the emergency has ended, so also must the extraordinary measures taken to meet it cease.<sup>159</sup>

It is in this test of necessity and its application by the courts that the American practice diverges sharply from that in Britain, where, under the doctrine of *Liversidge v. Anderson*, it is for the Executive to determine whether the measures taken are necessary to cope with the emergency. "Those who are responsible for the

<sup>155</sup> Citing *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

<sup>156</sup> 321 U. S. at 462. Cf. *Lichter v. United States*, 334 U. S. 742, 779-83 (1948).

<sup>157</sup> *Matter of Karlinski*, 180 Misc. 44, 57 (N. Y. Surr. Ct. 1943).

<sup>158</sup> Mr. Chief Justice Taney in *Mitchell v. Harmony*, 13 How. 115, 134 (U. S. 1851).

<sup>159</sup> *Ex parte Milligan*, 4 Wall. 2, 127 (U. S. 1866).

national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."<sup>160</sup> In this country, on the other hand, the test of necessity is a judicial test. What the allowable limits of Executive discretion are and whether or not they have been overstepped in a particular case are judicial questions.

It is true that even in this country the cases are not altogether consistent on this point. Thus, in *Moyer v. Peabody*,<sup>161</sup> Mr. Justice Holmes, in sustaining the authority of a state governor to hold in custody temporarily one whom he believed to be engaged in fomenting disorder, stated that "so long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief . . . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

This language, approaching the English doctrine in the conclusiveness given to the Executive action, must not, however, be taken as the prevailing American view, in the light of other cases. When Executive action under the war power "directs interferences with liberty or property—measures normally beyond the scope of governmental power, which are lawful if at all only because an abnormal situation has made them necessary and appropriate—it is of the very essence of the rule of law that the executive's *ipse dixit* is not of itself conclusive of the necessity."<sup>162</sup>

<sup>160</sup> Lord Parker in *The Zamora*, [1916] 2 A. C. 77, 107.

<sup>161</sup> 212 U. S. 78, 85 (1909). Cf. *Luther v. Borden*, 7 How. ¶ (U. S. 1849); *Martin v. Mott*, 12 Wheat. 19 (U. S. 1827), discussed in Fairman, "The Law of Martial Rule and the National Emergency" 55 Harv. L. Rev. 1266, 1270 (1942).

<sup>162</sup> *Id.* at 1272.

*Sterling v. Constantin*<sup>163</sup> is the judicial landmark here. That case concerned a martial-law proclamation by the Governor of Texas, and though not, therefore, directly in point on the war power the principles enunciated by the Court apply as well in reviewing Executive action in wartime. The Texas legislature had authorized the State Railroad Commission to prevent waste by limiting production in the petroleum industry. The complainants originally brought suit against the Commission to restrain the enforcement of its orders limiting production, and a federal court granted a temporary injunction. Upon finding that the orders of the Commission could no longer be enforced, the Governor issued a proclamation stating that the oil counties were in "a state of insurrection, tumult, riot, and a breach of the peace" and declaring "martial law" in that territory. He directed the commanding officer of the district to take such steps as he might deem necessary, subject to the orders of the Governor as commander in chief, among which was an order to limit oil production to the amount fixed by the Railroad Commission's order. Complainants then filed an amended bill making the Governor a party to their injunction suit. The district court found that, in fact, there had been no "insurrection"—"at no time has there been any actual uprising in the territory. At no time has any military force been exerted to put riots or mobs down. At no time . . . have the civil authorities or courts been interfered with or their processes made impotent."

The Governor, relying upon cases like *Moyer v. Peabody*, asserted that the courts could not inquire into the factual basis for his proclamation of martial law. "Having exercised this judgment and discretion, which the law authorizes and empowers him to exercise, the exercise thereof by the Governor of Texas cannot be questioned or reviewed by the judiciary."<sup>164</sup> Chief

<sup>163</sup> 287 U. S. 378 (1932).

<sup>164</sup> Defendant's Brief, p. 50, quoted in Fairman, "The Law of Martial Rule and the National Emergency" 55 Harv. L. Rev. 1264 (1942).



Justice Hughes, who delivered the opinion, rejected this contention in strong language. "If this extreme position could be deemed well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; . . . There is no such avenue of escape from the paramount authority of the Federal Constitution."<sup>165</sup>

Although conceding that the nature of the Executive power here "necessarily implies that there is a permitted range of honest judgment as to the measures to be taken,"<sup>166</sup> he maintains that this does not place the Executive action beyond judicial control. "It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."<sup>167</sup> In this case, the findings of the district court, fully supported by evidence, left "no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor."<sup>168</sup> The complainants were, therefore, entitled to an injunction.

However, it will be argued that the application of *Sterling v. Constantin* to the National Government in its exercise of the war power would be unrealistic in view of the exigencies of "total" war. To allow judicial review here, it may be said, would be to impede the successful prosecution of war. The observations of the House of Lords on the inappropriateness of a court of law

<sup>165</sup> 287 U. S. at 397-98.

<sup>166</sup> *Id.* at 399.

<sup>167</sup> *Id.* at 400. Cf. the concurring opinion of Stone, C.J., in *Duncan v. Kahana-moku*, 327 U. S. 304, 336 (1946).

<sup>168</sup> 287 U. S. at 403.

in these cases seem to be due to this viewpoint. As expressed by Lord Macmillan in *Liversidge v. Anderson*: "If the regulation had been framed so as to read, as the appellant would read it, 'If the Secretary of State has such cause of belief as a court of law would hold to be reasonable', I doubt if it would have commended itself as an emergency measure . . . . In a matter at once so vital and so urgent in the interests of national safety, I am unable to accept a reading of the regulation which would prescribe that the Secretary of State may not act in accordance with what commends itself to him as a reasonable cause of belief without incurring the risk that a court of law would disagree with him."<sup>169</sup>

This view appears to rest upon the fear that the courts will substitute their judgment for that of the Executive on the question of the necessity of challenged action. But this misconceives the function and scope of judicial review in these cases. As stated by Lord Atkin in the *Liversidge* case: "It is said that it could never have been intended to substitute the decision of judges for the decision of the minister, or, as has been said, to give an appeal from the minister to the courts. But no one proposes either a substitution or an appeal. A judge's decision is not substituted for the constable's on the question of unlawful arrest, nor does he sit on appeal from the constable. He has to bear in mind that the constable's authority is limited and that he can only arrest on reasonable suspicion, and the judge has the duty to say whether the conditions of the power are fulfilled. If there are reasonable grounds, the judge has no further duty of deciding whether he would have formed the same belief any more than, if there is reasonable evidence to go to a jury, the judge is concerned with whether he would have come to the same verdict. For instance, the minister may have reasonable grounds on the information before him for believing that a person is of 'hostile origin'. If so, any ruling by the courts either in

<sup>169</sup> [1942] A. C. at 256-57.

an action for false imprisonment or by way of habeas corpus is impossible though it should subsequently be proved beyond doubt that the minister's information was wrong and that the person was of purely British origin." <sup>170</sup>

Judicial control of action under the war power thus does not imply a substitution of the judicial judgment for that of the Executive on the question of the necessity of challenged action. In the words of Chief Justice Hughes in *Sterling v. Constantin*, the nature of the Executive power, here, "necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive." <sup>171</sup>

The judicial function in these cases is to prevent arbitrary Executive action, taken under the guise of the war power. Measures that clearly bear no relation to the prosecution of the war are to be condemned. But it is not for the courts to say whether or not the challenged measures were in fact necessary. The essentials of the judicial function are preserved when it is determined that there was a reasonable basis for the Executive action. The proper approach is that of Mr. Chief Justice Stone in *Hirabayashi v. United States*. "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken . . . . In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis

<sup>170</sup> *Id.* at 239.

<sup>171</sup> 287 U. S. at 399.

for the decision which they made. Whether we would have made it is irrelevant."<sup>172</sup>

That judicial control such as we are advocating will not unduly impede the successful prosecution of war is shown by its actual effect in practice. The English courts during the First World War did not hesitate to determine the legality of Executive action; and if this resulted in temporary inconvenience to the war effort, that was surely of slight importance as compared with the check upon arbitrary power afforded by judicial review. The lessons of American history are even more significant in disproving the thesis that freedom from all judicial control is essential to the effective waging of war. Whenever the existence of the nation has been at stake—from the struggle for independence to the last conflict—virtually unlimited powers to preserve it have been assumed. Yet at no time has it been thought necessary to subscribe to a doctrine such as that articulated by the House of Lords in *Liversidge v. Anderson*.

It might be asserted that the American experience can have little relevancy here, for this country has never been faced with the national necessity which confronted Britain during the Second World War. Such an assertion would, however, go too far. Can it be said, for example, that the situation facing President Lincoln at the outbreak of the Civil War was less pressing than that which confronted the British Government after Dunkirk?

The Civil War was the first "total" war of modern times. "The circumstances in which the government found itself after the fall of Sumter were entirely unprecedented."<sup>173</sup> Congress was not then in session, and immediate Executive action to preserve the Union was called for. In a series of proclamations, President Lincoln assumed unparalleled powers—in effect amounting to Executive control over the war effort—until legislative approval could be obtained. He called out 75,000 of the

<sup>172</sup> 320 U. S. 81, 101-2 (1943).

<sup>173</sup> Dunning, *Essays on the Civil War and Reconstruction* (1898) 14.

militia under a statute which his predecessor had held did not give the Executive such power.<sup>174</sup> Upon his own authority, "with a view . . . to the protection of public peace, and the lives and property of quiet and orderly citizens pursuing their lawful occupations," he proclaimed a blockade of the Southern ports.<sup>175</sup> In other proclamations, he called for volunteers and increased the size of the regular Army and Navy;<sup>176</sup> and ordered arrests by the military and suspension of the writ of habeas corpus.<sup>177</sup> "In the interval between April 12 and July 4, 1861, a new principle thus appeared in the constitutional system of the United States, namely, that of a temporary dictatorship. All the powers of government were virtually concentrated in a single department, and that the department whose energies were directed by the will of a single man."<sup>178</sup>

Soon after Congress met, vast new powers were conferred upon the Executive. The need for drastic action if the nation was to be preserved led to the delegation of the broadest authority—authority so sweeping that Lincoln has been characterized by a British observer as exercising "more arbitrary power than any Englishman since Oliver Cromwell."<sup>179</sup> The Executive was given what in effect amounted to complete control over the war effort. "Nor," as a leading student of the period has put it, "was any great influence exerted by the principle of the separation and co-ordination of departments."<sup>180</sup> Among the powers granted were: the authority to take possession of railroad and telegraph lines "when in his judgment the public safety may require it";<sup>181</sup> to control the transportation of troops, muni-

<sup>174</sup> 12 Stat. App. 1258 (1861).

<sup>175</sup> *Ibid.*

<sup>176</sup> *Id.* at 1260.

<sup>177</sup> Berdahl, *War Powers of the Executive in the United States* (1900) 190. An example of such action is given in 12 Stat. App. 1260 (1861).

<sup>178</sup> Dunning, *op. cit. supra* note 173, at 20.

<sup>179</sup> Rhodes, *op. cit. supra* note 144, at 213.

<sup>180</sup> Dunning, *op. cit. supra* note 173, at 58.

<sup>181</sup> 12 Stat. 334 (1862).

tions, and war materials;<sup>182</sup> to suspend the privilege of the writ of habeas corpus "whenever in his judgment the public safety may require it";<sup>183</sup> "whenever he shall deem it necessary, during the present war, to call for such number of men for the military service of the United States as the public exigencies may require";<sup>184</sup> and to declare commercial intercourse with parts of loyal states under the control of insurgents or in dangerous proximity to places under their control subject to the same prohibitions and conditions as intercourse between loyal and insurrectionary states, "for such time and to such extent as shall from time to time become necessary to protect the public interests."<sup>185</sup> In addition, the various acts and proclamations of the President without Congressional authority "respecting martial law, military trials by courts-martial or military commissions, or the arrest, imprisonment and trial of persons charged with participation in the late rebellion against the United States, or as aiders or abettors thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels" were ratified by Congress<sup>186</sup>—in effect amounting to a retroactive delegation of the power to suspend the Bill of Rights.

Yet though the powers assumed were broad enough to deal with the unprecedented emergency, they were not freed from the normal constitutional restraint of judicial control. Thus, the question of the validity of Lincoln's action in instituting a blockade of the Southern ports arose in the *Prize Cases*,<sup>187</sup> which were decided during a critical period of the war. The Court was not concluded by the Executive action, but went into the question of whether there was a reasonable basis for the measures taken—

<sup>182</sup> *Ibid.*

<sup>183</sup> 12 Stat. 755 (1863).

<sup>184</sup> 13 Stat. 6 (1864).

<sup>185</sup> 13 Stat. 376 (1864).

<sup>186</sup> 14 Stat. 432 (1867). See 12 Stat. 326 (1861), ratifying the President's acts and proclamations at the beginning of the war, before Congress met.

<sup>187</sup> 2 Bl. 635 (U. S. 1863).

"whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force." Under the circumstances of this case, the President was clearly justified in acting as he did, even without Congressional authorization. "The President was bound to meet it [the war] in the shape it presented itself without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."<sup>188</sup>

The ultimate in judicial control during the Civil War is, of course, the *Milligan* case,<sup>189</sup> which has been discussed at some length above. The language of the majority there, as we have seen, goes too far. The inadequacy of the *Milligan* test when applied to the conditions of modern warfare seems clear; that test "must be reappraised in the light of man's ingenuity to wage modern war."<sup>190</sup> It is important, however, to keep in mind that the test enunciated by Justice Davis was purely by way of *obiter*. About the actual holding—that *Milligan* came within the proviso of the Congressional act authorizing suspension of habeas corpus—there can be no dispute, and, in this, the entire Court agreed. The case thus becomes one of pure *ultra vires*; for the Executive action was outside the terms of the applicable statute.

The broad powers which were exercised during the Civil War subject to judicial control go far to disprove the assertion that such control is inconsistent with the successful prosecution of war. Our experience during the First and Second World Wars tends to reinforce this conclusion.

The powers granted to the Executive during the First World War were so vast that only a cursory glance can be devoted to

<sup>188</sup> *Id.* at 669. Some of the language in the opinion pointing in the direction of Executive finality must be discounted, in view of the Court's actual examination of the grounds for the Executive action. "While purporting to treat the proclamation as conclusive, the Court recalled facts of public notoriety to show that it was indeed well founded." Fairman, "The Law of Martial Rule and the National Emergency" 55 Harv. L. Rev. 1283 (1942).

<sup>189</sup> *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866), *supra* p. 306.

<sup>190</sup> *Schueler v. Drum*, 51 F. Supp. 383, 387 (E. D. Pa. 1943).

them. "This is a war of resources no less than of men, perhaps even more than of men," said President Wilson,<sup>191</sup> and in accord with this viewpoint the most drastic controls over the nation's resources were given him by Congress. Whereas Lincoln in many instances had to act at once without waiting for Congressional authorization to avoid the risk of national disaster, Wilson was largely able to prosecute the war efficiently under the powers delegated to him.<sup>192</sup> Indeed, some in Congress wanted to go further and make him "a supreme dictator" over every phase of war activity.

Among the more significant delegations were grants of the power: to order any industry or firm having the facilities to comply to furnish supplies or equipment for the Army in preference to any other commitments at prices named by him, and, in case of default, to seize and operate the plants;<sup>193</sup> to take possession and assume control of any system or systems of transportation;<sup>194</sup> to take over and operate enemy vessels;<sup>195</sup> to raise and organize the armed forces;<sup>196</sup> to designate prohibited places under the Espionage Act;<sup>197</sup> to regulate exports;<sup>198</sup> to control priorities in transportation;<sup>199</sup> to license the importation, manufacture, storage, mining, or distribution of any necessities;<sup>200</sup> to requisition necessities for public use;<sup>201</sup> to requisition and take over, for use or operation by the Government, any factory, packing house, oil pipe line, mine or other plant, or any part thereof, in or through which any necessities are or may be manufactured, produced, prepared, or mined, and to operate the

<sup>191</sup> Quoted in Berdahl, *op. cit. supra* note 177, at 203.

<sup>192</sup> See Hart, Ordinance Making Powers of the President (1925) 100-1.

<sup>193</sup> 39 Stat. 213 (1916).

<sup>194</sup> *Id.* at 645.

<sup>195</sup> 40 Stat. 75 (1917).

<sup>196</sup> *Id.* at 76.

<sup>197</sup> *Id.* at 219.

<sup>198</sup> *Id.* at 223.

<sup>199</sup> *Id.* at 272.

<sup>200</sup> *Id.* at 277.

<sup>201</sup> *Id.* at 279.



same;<sup>202</sup> to regulate the prices of wheat and fuel;<sup>203</sup> to regulate trading and communications with the enemy;<sup>204</sup> to censor communications to foreign countries;<sup>205</sup> to license the use of enemy patents and trade-marks;<sup>206</sup> and to assume control of any telegraph, telephone, marine cable, or radio system.<sup>207</sup> In addition, the President was given control over the administrative machinery of the nation by the Overman Act,<sup>208</sup> which authorized him to make such redistribution of functions among existing agencies as he might deem necessary; to utilize, co-ordinate, or consolidate any existing executive agencies; and to transfer any duties or powers together with any portion of the personnel or equipment from one agency to another.

Yet though the powers granted were tremendous, their exercise was subject to judicial control. It was for the courts to say whether the test of necessity was met; and while the attitude of the judiciary was in general a realistic one, sustaining the grant and exercise of the power in line with the national emergency,<sup>209</sup> the mere fact that there was the possibility of such review by an impartial judicial tribunal served to prevent abuses under the war power.

The powers exercised during the recent conflict were, if anything, even broader than those exercised by President Wilson. Here, too, the powers were so vast that their extent can only briefly be sketched. The applicable statutes were couched in the

<sup>202</sup> *Ibid.*

<sup>203</sup> Food and Fuel Control Act, 40 Stat. 276 (1917). See Berdahl, *op. cit.* *supra* note 177, at 205.

<sup>204</sup> Trading with the Enemy Act, 40 Stat. 411 (1917).

<sup>205</sup> *Id.*, § 3 (d), 40 Stat. 413.

<sup>206</sup> *Id.*, § 10 (c), 40 Stat. 420.

<sup>207</sup> 40 Stat. 904.

<sup>208</sup> 40 Stat. 556 (1918).

<sup>209</sup> See, e.g., Selective Draft Law Cases, 245 U. S. 366 (1918); McKinley v. United States, 249 U. S. 397 (1919); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146 (1919); Block v. Hirsch, 256 U. S. 135 (1921). But see United States v. Cohen Grocery Co., 255 U. S. 81 (1921).

broadest terms; standards such as the *Schechter* test<sup>210</sup> requires are absent, for Executive discretion in waging war cannot be canalized. A brief glance at some of the more important delegations will indicate this.

The President was given the power by the Selective Training and Service Act to make rules and regulations for the drafting of male citizens into the armed forces,<sup>211</sup> and to terminate their periods of service.<sup>212</sup> So-called "conscription of industry" was also provided for: Plants that refused to give preference to the United States in the execution of war orders or to manufacture necessary supplies or to furnish them at a reasonable price as determined by the Secretaries of War or the Navy could be taken over by the President.<sup>213</sup>

Powers analogous to those granted President Wilson by the Overman Act were conferred by the First War Powers Act.<sup>214</sup> The language is similar to the earlier statute: The President was "authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title." Under this sweeping power there was effected a virtual reorganization of the Executive department. Powers and functions were redistributed and many of the most important war agencies set up under the authority granted by this statute.

The requisitioning and priorities powers delegated were at least as broad as those given during the earlier conflict. The Chief Executive was authorized to requisition "any military or naval equipment, supplies, or munitions, or component parts

<sup>210</sup> *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935), *supra* p. 27.

<sup>211</sup> 54 Stat. 885 (1940).

<sup>212</sup> 55 Stat. 799 (1941).

<sup>213</sup> 54 Stat. 892 (1940).

<sup>214</sup> 55 Stat. 838 (1941).

thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions," when he deemed that such requisitioning was needed for the defense of the United States.<sup>215</sup> He could also in his discretion give priority over all deliveries for private account or for export to contracts or orders of the Army and Navy; contracts or orders for the government of any country whose defense he deemed vital to the defense of the United States under the Lend-Lease Act; and contracts or orders which he deemed necessary or appropriate to promote the defense of the United States.<sup>216</sup>

Powers of price control and wage stabilization were much greater than the corresponding delegations during the First World War. The Emergency Price Control Act<sup>217</sup> conferred the power to regulate prices in the most sweeping terms—a delegation which, as we have seen, was sustained by the Supreme Court in *Yakus v. United States*. The Stabilization Act of 1942<sup>218</sup> was drawn up in even broader terms. The President was authorized "to issue a general order stabilizing prices, wages, and salaries, to the extent that he finds it necessary to aid in the effective prosecution of the war or to correct gross inequities," and to promulgate such regulations as might be necessary and proper to effectuate these powers.

Control over labor disputes affecting the war effort was granted by the War Labor Disputes Act.<sup>219</sup> The National War Labor Board, originally created by Executive order, was authorized to decide labor disputes that might lead to a substantial interference with the war effort, and to provide by order the wages and hours and all other terms and conditions governing the relations between the parties. As a means of enforcing the

<sup>215</sup> *Id.* at 742.

<sup>216</sup> 56 Stat. 177 (1942).

<sup>217</sup> *Id.* at 23.

<sup>218</sup> *Id.* at 765.

<sup>219</sup> 57 Stat. 163 (1943).

Board's orders, a provision was added to the "conscription of industry" section of the Selective Training and Service Act. The power of the President under that section to take over plants which refused to comply with its provisions was extended to apply "to any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith. Such power and authority may be exercised . . . with respect to any such plant, mine, or facility whenever the President finds, after investigation, and proclaims that there is an interruption of the operation of such plant, mine, or facility as a result of a strike or other labor disturbance, that the war effort will be unduly impeded or delayed by such interruption, and that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort."<sup>220</sup> Under this broad language, the power of the Executive would seem to extend to every industry in the nation, for, under modern industrial conditions, the interruption of the operation of any plant can be found unduly to impede or delay the war effort.

The President was thus given a very extensive control over every phase of the war effort; and if the degree of intensity of Executive authority does not seem unduly great by British standards, it must be remembered that, for this country, the conferring of such power represented a virtual constitutional revolution. Yet the introduction of the doctrine of *Liversidge v. Anderson* was not thought necessary for the successful waging of war.<sup>221</sup> Nor did control by the courts as exercised measurably interfere

<sup>220</sup> *Id.* at 164.

<sup>221</sup> A limitation of the normal right of review was contained in the Emergency Price Control Act of 1942, which imposed a thirty-day time limit upon appeals from price-control orders and provided that they could only be brought in a specially created court, the Emergency Court of Appeals. This limitation was upheld in *Yakus v. United States*, 321 U. S. 414 (1944), though with three justices dissenting. But this, of course, does not go anywhere near the House of Lords' doctrine.

with the war effort. This can be shown by an analysis of some of the cases arising under the American equivalent of regulation 18 B—the evacuation of the Japanese from the West Coast.

The situation facing the Government on the Pacific Coast at the outbreak of the war is well put by Mr. Justice Douglas in *Hirabayashi v. United States*:<sup>222</sup> "After the disastrous bombing of Pearl Harbor the military had a grave problem on its hands. The threat of Japanese invasion of the west coast was not fanciful but real. The presence of many thousands of aliens and citizens of Japanese ancestry in or near to the key points along that coast line aroused special concern in those charged with the defense of the country. They believed that not only among aliens but also among citizens of Japanese ancestry were those who would give aid and comfort to the Japanese invader and act as a fifth column before and during an invasion. If the military were right in their belief that among citizens of Japanese ancestry there was an actual or incipient fifth column, we were indeed faced with the imminent threat of an emergency."

The President, by Executive Order No. 9066,<sup>223</sup> had authorized the appropriate military commanders to designate military areas from which persons could be excluded, and with respect to which the right of any person to enter, remain in, or leave was to be subject to any restrictions imposed. Congress subsequently made it a misdemeanor for anyone knowingly to violate restrictions or orders of the military commander,<sup>224</sup> which action was held to ratify the Executive order by the Supreme Court.<sup>225</sup> Among the restrictions imposed on the West Coast was a curfew applicable to all persons of Japanese ancestry. The President then promulgated Executive Order No. 9102,<sup>226</sup> which established the War Relocation Authority to "formulate and effectuate a pro-

<sup>222</sup> 320 U. S. 81, 105 (1943).

<sup>223</sup> (Feb. 19, 1942) 7 Fed. Reg. 1407.

<sup>224</sup> 56 Stat. 173 (1942).

<sup>225</sup> *Hirabayashi v. United States*, 320 U. S. 81 (1943).

<sup>226</sup> (Mar. 18, 1942) 7 Fed. Reg. 2165.

gram for the removal, from the areas designated . . . under the authority of Executive Order No. 9066 . . . of the persons or classes of persons designated under such Executive Order" and to "provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate and supervise their activities." The military commander of the Western Defense Command then issued a series of Civilian Exclusion Orders applicable to "all persons of Japanese ancestry, both alien and non-alien." As the military commander had only been given the authority to regulate entry or movement in the evacuated areas, the evacuation was entrusted to the War Relocation Authority, which set up relocation centers in interior states in which to detain the evacuees. Under this evacuation program, more than one hundred thousand persons of Japanese ancestry were transferred from the West Coast to states in the interior.

Whatever criticisms have been leveled against detentions under regulation 18 B in Britain apply with even greater force to the treatment of the Japanese in this country. Under 18 B there was at least an ostensible cause for each detention. The American program, on the other hand, applied en masse to a section of the community, whose members were thus discriminated against solely because of their racial origins, regardless of the loyalty of the particular individuals affected. As stated by Mr. Justice Murphy, with regard to the curfew order preliminary to the evacuation program: "Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry."<sup>227</sup>

<sup>227</sup> Concurring in *Hirabayashi v. United States*, 320 U. S. at 111.

The record of his Government in dealing with the Japanese evacuation is not one that an American can contemplate wholly with satisfaction. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."<sup>228</sup> Even assuming that the original evacuation was justified by military necessity, one fails to see why it was necessary to detain so many of the evacuees until almost the end of the war, long after the original necessity had passed. The record in Britain where, during a period of six months, the 112 alien tribunals or hearing boards set up shortly after the outbreak of the war summoned and examined approximately 74,000 enemy aliens, of whom some 64,000 were freed from internment and from any special restrictions,<sup>229</sup> shows what could have been done, and places the treatment of the problem by the American Government in a most unfavorable light.

We must, however, concern ourselves here only with the bare question of the legality of the Executive action. In *Hirabayashi v. United States*,<sup>230</sup> the Supreme Court sustained the curfew order, applicable to persons of Japanese ancestry promulgated by the military commander. The test of whether there was a reasonable necessity for the action taken was clearly met here. "We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."<sup>231</sup> There was thus an ample rational basis for the Executive action. The language of the opinion is very carefully guarded; the Court deliberately does not deal with the larger problem of the validity of the evacuation program. "We decide only the issue as we have defined it—we decide only

<sup>228</sup> Mr. Chief Justice Stone, *id.* at 100.

<sup>229</sup> See Kempner, "The Enemy Alien Problem in the Present War" 34 Am. J. Int. L. 443, 444-46 (1940).

<sup>230</sup> 320 U. S. 81 (1943).

<sup>231</sup> *Id.* at 101.

that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power.”<sup>232</sup>

In *Korematsu v. United States*,<sup>233</sup> the Court went one step further, and upheld the conviction of an American citizen of Japanese descent for remaining in a military area contrary to a civilian-exclusion order of the military commander. Here, too, the Executive action under the particular circumstances is justified by the test of necessity. “In the light of the principles we announced in the *Hirabayashi* Case, we are unable to conclude, that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. . . . exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.”<sup>234</sup> The test, as in all of these cases, is not whether the action taken was in fact necessary on the facts as found by the Court, but whether there was a reasonable basis for such action. “We cannot—by availing ourselves now of the calm perspective of hindsight—now say that at that time these actions were unjustified.”<sup>235</sup>

The validity of the original program of exclusion should not, however, justify the continued detention of evacuees where there is admittedly no military necessity for such detention. Such necessity no longer exists with regard to a concedely loyal citizen after sufficient time has elapsed for such loyalty to be investigated and established. The judicial attitude on this point was first articulated by a remark in Mr. Justice Douglas’ concurring opinion in the *Hirabayashi* case: “Obedience to the military orders is one thing. Whether an individual member of a group must be afforded at some stage an opportunity to show that, being loyal, he should be reclassified is a wholly different question.”<sup>236</sup>

<sup>232</sup> *Id.* at 402.

<sup>233</sup> 323 U. S. 214 (1944), opinion per Black, J.

<sup>234</sup> *Id.* at 217-18.

<sup>235</sup> *Id.* at 224.

<sup>236</sup> 320 U. S. at 108.



This problem was presented directly to the Court in *Ex parte Endo*,<sup>237</sup> decided the same day as the *Korematsu* case. The *Endo* case was a habeas corpus proceeding by a citizen of Japanese ancestry who was detained in a war relocation center. The Court starts by assuming that the initial detention was justified by the necessity to prevent espionage and sabotage. "The Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully."<sup>238</sup> The approach is similar to that in the *Hirabayashi* case. Here, too, there was "substantial basis for the conclusion . . . that the [evacuation] as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion."<sup>239</sup> The standard of necessity does not, however, go so far as to justify the continued detention of the petitioner, who was conceded by the Government to be a loyal and law-abiding citizen. "A citizen who is concededly loyal presents no problem of espionage or sabotage . . . . He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized . . . . The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else."<sup>240</sup> The petitioner is consequently "entitled to an unconditional release from the War Relocation Authority."<sup>241</sup>

<sup>237</sup> 323 U. S. 283 (1944), opinion per Douglas, J.

<sup>238</sup> *Id.* at 298.

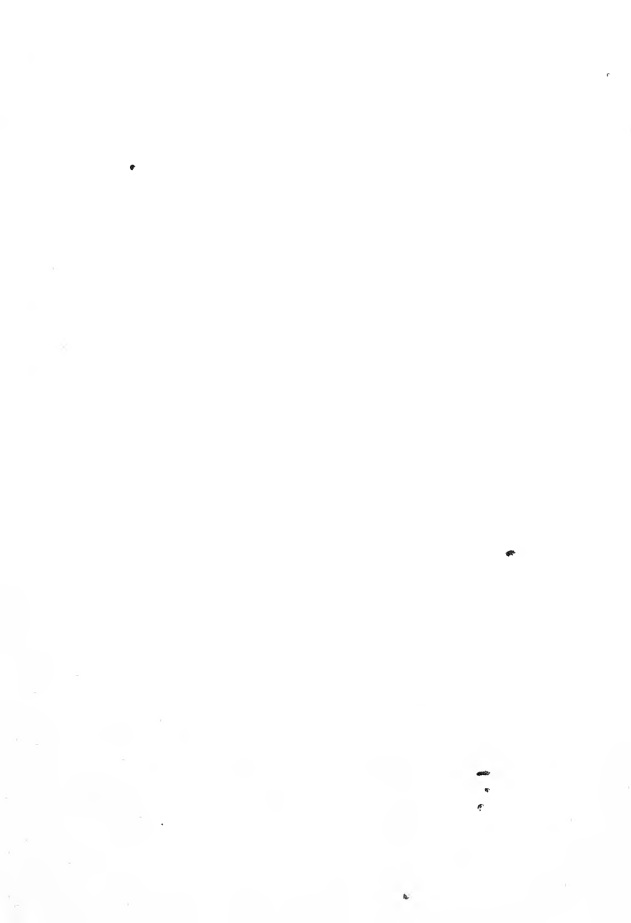
<sup>239</sup> *Hirabayashi v. United States*, 320 U. S. at 95.

<sup>240</sup> 323 U. S. at 302.

<sup>241</sup> *Id.* at 304.

The *Endo* case clearly demonstrates that the test of necessity is in this country a judicial test. It is for the Court to determine whether or not the particular action taken is justified by the exigencies of emergency. It is true that the scope of review here is narrower than that normally exercised over Executive action. Ordinary conceptions of judicial review must give way somewhat in times of pressing emergency. As stated by Mr. Justice Douglas, concurring, in the *Hirabayashi* case: "The orders as applied to the petitioner are not to be tested by the substantial evidence rule. Peace time procedures do not necessarily fit war time needs."<sup>242</sup> This is quite a different thing, however, from the doctrine of *Liversidge v. Anderson*, which bars all resort to the courts. Under our test, sufficient scope is given to the war power to enable war successfully to be prosecuted. At the same time, the Executive is not the final judge of what measures are necessary to meet the emergency. Measures that are manifestly arbitrary—i.e., those that bear no reasonable relation to the necessities of the situation—can thus be condemned. Judicial control to this extent is of fundamental importance, if even war is to be waged in some subordination to law. The threat of being brought to account for clearly arbitrary action is necessary to curb excessive use of the war power. Otherwise, *inter arma leges silent*; and who is to say when they will again become fully articulate?

<sup>242</sup> 320 U. S. at 106.



# TABLE OF CASES

## BRITISH

	PAGE
Adel Muhammed El Dabbah v. Attorney-General for Palestine, [1944] A. C. 156 . . . . .	324n.
Allingham v. Minister of Agriculture, [1948] 1 All E. R. 780 . . . . .	322n.
Associated Provincial Picture Houses v. Wednesbury Corp., [1948] 1 K. B. 223 . . . . .	174n.
Attorney-General v. Brown, [1920] 1 K. B. 773 . . . . .	55-57, 167
Attorney-General v. De Keyser's Hotel, [1920] A. C. 508 . . . . .	320n., 323n.
Attorney-General v. Foran, [1916] 2 A. C. 128 . . . . .	164n.
Attorney-General v. Hanwell U. D. C., [1900] 1 Ch. 51, <i>aff'd</i> [1900] 2 Ch. 377 . . . . .	193
Attorney-General v. Hooper, [1893] 3 Ch. 483 . . . . .	223n.
Attorney-General v. Manchester Corp. (1930), 144 L. T. R. 112 . . . . .	290n.
Bainbridge, <i>In re</i> , [1939] 1 K. B. 500 . . . . .	290n., 291n., 295n.
Bean v. Doncaster Amalgamated Collieries, Ltd., [1944] 2 All E. R. 279 . . . . .	287n.
Beck and Pottitzer, <i>In re</i> an Application by, [1948] 2 K. B. 339 . . . . .	244n.
Berkhamsted Grammar School, <i>In re</i> , [1908] 2 Ch. 25 . . . . .	217n.
Bird v. Vestry of St. Mary Abbots (1895), 72 L. T. R. 599 . . . . .	217n.
Blackpool Corp. v. Locker, [1948] 1 K. B. 349 . . . . .	135n.
Blencowe v. Northamptonshire C. C. (1907), 96 L. T. R. 385 . . . . .	195n.
Board of Education v. Rice, [1910] 2 K. B. 165, [1911] A. C. 179 195, 198, 236	164n.
Bombay and Persia Steam Navigation Co. v. Maclay, [1920] 3 K. B. 402 . . . . .	155, 209n., 289-90
Bowman, <i>In re</i> , [1932] 2 K. B. 621 . . . . .	121n.
Brierly v. Phillips, [1947] K. B. 541 . . . . .	316n.
Brightman & Co. v. Tate, [1919] 1 K. B. 463 . . . . .	264n.
Broadbent v. Rotherham Corp., [1917] 2 Ch. 31 . . . . .	290n.
Burgesses of Sheffield v. Minister of Health (1936), 154 L. T. R. 183 . . . . .	164n.
Burghes v. Attorney-General, [1911] 2 Ch. 139 . . . . .	290n., 294n., 296n.
Butler, <i>In re</i> , [1939] 1 K. B. 570 . . . . .	332n.
Caledonian Railway Co. v. North British Railway Co. (1881), 6 App. Cas. 114 . . . . .	315n.
Campbell v. Spears (1918), 120 L. T. R. 90 . . . . .	322n.
Carlsh v. East Ham Corp., [1948] 2 All E. R. 550 . . . . .	339n.
Carltona, Ltd., v. Commissioners of Works, [1943] 2 All E. R. 560 . . . . .	318-20, 327
Chester v. Bweson, [1920] 1 K. B. 829 . . . . .	164n., 315n., 318n.
China Mutual Navigation Co. v. Maclay, [1918] 1 K. B. 33 . . . . .	322n.
Chittambaram v. King Emperor, [1947] A. C. 200 . . . . .	312n.
Clifford and O'Sullivan, <i>Re</i> , [1921] 2 A. C. 570 . . . . .	285, 287n.
Commissioners of Inland Revenue v. Lysaght, [1928] A. C. 234 . . . . .	

	PAGE
Conway v. Stocks, [1943] K. B. 438 . . . . .	339n.
Cooper v. Wandsworth Board of Works (1863), 14 C. B. (N.S.) 180 . . . . .	223n.
Cooper v. Wilson, [1937] 2 K. B. 309 . . . . .	84
Corporation of Waterford v. Murphy, [1920] 2 I. R. 165 . . . . .	192, 193
Crook v. Pritchard, [1920] 3 K. B. 377 . . . . .	217n.
Crown of Leon v. Admiralty Commissioners, [1921] 1 K. B. 595 . . . . .	315n.
Denby & Sons v. Minister of Health, [1936] 1 K. B. 337 . . . . .	268n.
DeVerteuil v. Knaggs, [1918] A. C. 557 . . . . .	226n.
Dimes v. Grand Junction Canal (1852), 3 H. L. C. 759 . . . . .	253n.
Director of Public Prosecutions v. Ford (1918), 38 T. L. R. 206 . . . . .	316n.
Duncan v. Knill (1907), 96 L. T. R. 911 . . . . .	217n.
Dyson, <i>Ex parte</i> (1915), 31 T. L. R. 425 . . . . .	316n.
Dyson v. Attorney-General, [1911] 1 K. B. 410, [1912] 1 Ch. 158 . . . . .	163-64
Ellis v. Dubowski, [1921] 3 K. B. 621 . . . . .	97n.
Endowed Schools Act, <i>In re the</i> , [1894] A. C. 252 . . . . .	169n.
Ernest v. Commissioner of Metropolitan Police (1919), 89 L. J. K. B. 42 . . . . .	315n.
Errington v. Minister of Health, [1935] 1 K. B. 249 . . . . .	209n., 264-66, 267, 268, 273, 274
Eshugbayi Eleko v. Government of Nigeria, [1931] A. C. 662 . . . . .	303n.
Estate and Trust Agencies v. Singapore Improvement Co., [1937] A. C. 898 . . . . .	268n.
Fenwick v. Rural Sanitary Authority, [1891] 2 Q. B. 216 . . . . .	193n.
Fisher v. Jackson, [1891] 2 Ch. 84 . . . . .	226n.
Fletcher v. Minister of Town and Country Planning, [1947] 2 All E. R. 496 . . . . .	269n.
Foreman, <i>Ex parte</i> (1887), 18 Q. B. D. 393 . . . . .	178n.
Fowle v. Monsell (1920), 90 L. J. K. B. 105 . . . . .	315n.
Fowler & Co. v. Duncan, [1941] Ch. 450 . . . . .	339n.
Fox v. Spicer (1917), 86 L. J. K. B. 580 . . . . .	316n.
Franklin v. Minister of Town and Country Planning, [1947] 1 All E. R. 396, 612, [1948] A. C. 87 . . . . .	270-76
Fredman v. Minister of Health (1936), 154 L. T. R. 240 . . . . .	226n.
Frome United Breweries Co. v. Bath Justices, [1926] A. C. 586 . . . . .	253n., 257n.
Frost v. Minister of Health, [1935] 1 K. B. 286 . . . . .	266n., 267
Gateshead Union v. Durham C. C., [1918] 1 Ch. 416 . . . . .	198n.
General Medical Council v. Spackman, [1943] A. C. 627 . . . . .	258n.
Grant v. Knaresborough U. D. C., [1928] Ch. 310 . . . . .	164n.
Great Western Ry. Co. v. Bater, [1922] 2 A. C. 1 . . . . .	284-85, 287n., 293
Gurney v. Houghton (1920), 123 L. T. R. 706 . . . . .	315n.
Hall-Dalwood v. Emerson (1917), 87 L. J. K. B. 296 . . . . .	315n.
Halse, <i>Re</i> (1937), 157 L. T. R. 140 . . . . .	290n.
Hopkins v. Smethwick Local Board of Health (1890), 24 Q. B. D. 712 . . . . .	223n.
Horn v. Minister of Health, [1937] 1 K. B. 164 . . . . .	267n.
Horton v. Owen, [1943] K. B. 111 . . . . .	339n.
Howsin, <i>Ex parte</i> (1917), 33 T. L. R. 527 . . . . .	316n.
Hudson's Bay Co. v. Maclay (1920), 36 T. L. R. 469 . . . . .	315n.
Hutton v. Attorney-General, [1920] 1 Ch. 427 . . . . .	86n.
Insall v. Nottingham Corp., [1949] 1 K. B. 261 . . . . .	99n.

	PAGE
Institute of Patent Agents v. Lockwood, [1894] A. C. 347	
177-80, 181, 184, 185, 186, 187, 258	
Irving v. Patterson, [1943] Ch. 180	217n.
Johnson & Co. v. Minister of Health, [1947] 2 All E. R. 395	267n.
Johnson v. Sargent, [1918] 1 K. B. 101	140
Jones v. Conway Water Supply Board (1893), 69 L. T. R. 265	218n.
Jones v. Farrell, [1940] 3 All E. R. 608	339n.
Jones v. Robson, [1901] 1 K. B. 673	217
King's Prerogative in Saltpetre (1606), 12 Co. Rep. 12	313n.
Kruse v. Johnson, [1898] 2 Q. B. 91	174
Labour Relations Board of Saskatchewan v. John Iron Works, [1949]	
A. C. 134	83
Lancaster v. Burnley Corp., [1915] 1 K. B. 259	74n.
Law v. Chartered Institute of Patent Agents, [1919] 2 Ch. 276	
242n., 254n., 258-59	
Leakey v. Dinglinsor (1891), 65 L. T. R. 152	195n.
Leeson v. General Council of Medical Education (1889), 43 Ch. D.	
366	213, 254, 258n.
Leonard v. Redbrook Tinplate Co., [1930] 1 K. B. 643	55n.
Lipton, Ltd., v. Ford, [1917] 2 K. B. 647	315n.
Liversidge v. Anderson, [1942] A. C. 206	
329-37, 338, 339, 343, 347, 349, 357, 363	
Local Government Board v. Arlidge, [1915] A. C. 120	
214, 236-38, 239, 240, 245-47, 248, 250, 251	
London County Council (Riley Street, Chelsea, No. 1) Order, 1938,	
Re the, [1945] 2 All E. R. 484	291n.
London County Council v. Illuminated Advertisements Co., [1904] 2	
K. B. 886	297n.
MacLean v. The Workers' Union, [1929] 1 Ch. 602	258
Magdalen College Case (1615), 11 Co. Rep. 66 b	313n.
Malverer v. Spinke (1538), 1 Dyer 35 b, 36 b	313n.
Manchester (Ringway Airport) Compulsory Purchase Order, Re (1935),	
153 L. T. R. 219	268n.
Marais, Ex parte, [1902] A. C. 109	310-13
Margerison v. Hind & Co., [1922] 1 K. B. 214	249n.
Marriott v. Minister of Health (1936), 154 L. T. R. 47	244n.
Marshall Shipping Co. v. Board of Trade, [1923] 2 K. B. 343	320n.
Masters v. Pontypool Local Government Board (1878), 9 Ch. D. 677	223n.
Michaels v. Block (1918), 34 T. L. R. 438	316n.
Millard v. Wastall (1898), 77 L. T. R. 692	219n.
Miller v. Minister of Health, [1946] K. B. 626	228n., 267n.
Minister of Health v. Rex; ex parte Yaffe, [1930] 2 K. B. 98, [1931] A.	
C. 494	178n., 179, 185-88, 189n., 190, 191, 192, 197, 201
Minister of National Revenue v. Wright's Canadian Ropes, [1947]	
A. C. 109n.	77n., 287n.
Morris v. Minister of Pensions, [1948] 1 All E. R. 748	155n.
Murphy v. Rex, [1911] A. C. 401	198n.
National Telephone Co., Ltd., v. Postmaster-General, [1913] A. C. 546	92n.

	PAGE
Newcastle Breweries, Ltd., v. Rex, [1920] 1 K. B. 854 . . . . .	320n.
Newhill Compulsory Purchase Order, <i>Re</i> , [1938] 2 All E. R. 163 . . . . .	302n.
Norman, <i>Ex parte</i> (1915), 85 L. J. K. B. 203 . . . . .	316n.
Norman v. Mathews (1916), 85 L. J. K. B. 857 . . . . .	316n.
Offer v. Minister of Health, [1936] 1 K. B. 40 . . . . .	267
O'Neill v. Middlesex Insurance Committee, [1916] 1 K. B. 331 . . . . .	88
Parry v. Puddicombe (1918), 87 L. J. K. B. 894 . . . . .	315n.
Parsons v. Lakenheath School Board (1889), 58 L. J. Q. B. 371 . . . . .	230n.
Pioneer Laundry and Dry Cleaners, Ltd., v. Minister of National Revenue, [1940] A. C. 127 . . . . .	77n.
Point of Ayr Collieries, Ltd., v. Lloyd George, [1943] 2 All E. R. 546 . . . . .	337-39
Price v. Minister of Health, [1947] 1 All E. R. 47 . . . . .	267n.
Progressive Supply Co., Ltd., v. Dalton, [1943] Ch. 54 . . . . .	339n.
R. and W. Paul, Ltd., v. Wheat Commission, [1937] A. C. 139 . . . . .	170-72
Racecourse Betting Control Board v. Secretary for Air, [1944] Ch. 114 . . . . .	155n.
Rayner v. Mayor of Stepney, [1911] 2 Ch. 312 . . . . .	219n.
Rees Roturbo Development Syndicate, Ltd., v. Commissioners of Inland Revenue, [1928] 1 K. B. 506 . . . . .	283n.
Reg. (Conyngham) v. Pharmaceutical Society, [1899] 2 I. R. 132 . . . . .	192n.
Reg. v. Commissioners for Special Purposes of the Income Tax (1888), 21 Q. B. D. 313 . . . . .	300n.
Reg. v. Local Government Board (1882), 10 Q. B. D. 309 . . . . .	73, 88n.
Reg. v. Rand (1866), L. R. 1 Q. B. 230 . . . . .	254n.
Reg. v. Sankey (1878), 3 Q. B. D. 379 . . . . .	211n.
Reg. v. Staines Union (1893), 69 L. T. R. 714 . . . . .	229-30
Rex (Cairns) v. Local Government Board, [1911] 2 I. R. 331 . . . . .	226n.
Rex (Garde) v. Strickland, [1921] 2 I. R. 317 . . . . .	313n.
Rex (Johnstone) v. O'Sullivan, [1923] 2 I. R. 13 . . . . .	313n.
Rex (O'Brien) v. Military Governor, [1924] 1 I. R. 32 . . . . .	313n.
Rex (Ronayne and Mulcahy) v. Strickland, [1921] 2 I. R. 333 . . . . .	313n.
Rex v. Allen, [1922] 2 I. R. 241 . . . . .	311n., 312n.
Rex v. Architect's Registration Tribunal, [1945] 2 All E. R. 131 . . . . .	258n.
Rex v. Baggallay, [1913] 1 K. B. 290 . . . . .	137n.
Rex v. Blackpool Rent Tribunal, [1948] 2 K. B. 277 . . . . .	101n.
Rex v. Bradford Corp.; <i>ex parte</i> Minister of Transport (1926), 42 T. L. R. 524 . . . . .	197n.
Rex v. Complaints Tribunal of Central Profiteering (1920), 37 T. L. R. 228 . . . . .	258n.
Rex v. Comptroller General of Patents, [1941] 2 K. B. 306 . . . . .	328, 339n.
Rex v. Croydon Rent Tribunal, [1948] 1 K. B. 60 . . . . .	101n.
Rex v. Denison (1916), 85 L. J. K. B. 1744 . . . . .	316n.
Rex v. Electricity Commissioners, [1924] 1 K. B. 171 157n., 158n., 160, 180-82, 83, 184, 185	
Rex v. Electricity Commissioners; <i>ex parte</i> South Wales Electric Power Co., [1941] 2 K. B. 256 . . . . .	182n.
Rex v. Essex Justices, [1927] 2 K. B. 475 . . . . .	249n.
Rex v. Furnished Houses Rent Tribunal, [1947] 1 All E. R. 448 . . . . .	101n., 160n.
Rex v. Halliday, [1917] A. C. 260 . . . . .	167n., 315n., 316-17, 328, 331

	PAGE
Rex v. Hampden (1683), 3 State Tr. 824 . . . . .	314
Rex v. Hampstead and St. Pancras Rent Tribunal, [1947] K. B. 973 . . . . .	101n.
Rex v. Hendon R. D. C., [1933] 2 K. B. 696 . . . . .	182n.
Rex v. Housing Appeal Tribunal, [1920] 3 K. B. 334 . . . . .	223-26, 227
Rex v. Howard, [1902] 2 K. B. 363 . . . . .	257n.
Rex v. Hudson, [1915] 1 K. B. 838 . . . . .	244
Rex v. Huntingdon Confirming Authority, [1929] 1 K. B. 698 . . . . .	226n.
Rex v. Judge Amphlett, [1915] 2 K. B. 223 . . . . .	226n.
Rex v. Kuepferle (1915), 31 T. L. R. 461 . . . . .	316n.
Rex v. Local Government Board, [1922] 2 I. R. 76 . . . . .	298n.
Rex v. Local Government Board, [1914] 1 K. B. 160 . . . . .	215n., 244n., 248n.
Rex v. London County Council, [1931] 2 K. B. 215 . . . . .	160n.
Rex v. London County Council, [1892] 1 Q. B. 190 . . . . .	257n.
Rex v. Ludlow; <i>ex parte</i> Barnsley Corp., [1947] K. B. 634 . . . . .	160n., 300n.
Rex v. Lyon, [1922] 1 K. B. 232 . . . . .	147
Rex v. Marylebone County Court Judge, [1906] 2 K. B. 426 . . . . .	172n.
Rex v. Middlesex Justices; <i>ex parte</i> Walsall Union, [1907] 2 K. B. 581 . . . . .	209
Rex v. Milk Marketing Board (1934), 50 T. L. R. 559 . . . . .	257n.
Rex v. Minister of Health, [1939] 1 K. B. 232 . . . . .	159n., 198n.
Rex v. Minister of Health; <i>ex parte</i> Davis, [1929] 1 K. B. 619 . . . . .	183-84, 185, 201, 204
Rex v. Minister of Health; <i>ex parte</i> Dore, [1927] 1 K. B. 765 . . . . .	167-68
Rex v. Minister of Health; <i>ex parte</i> Hack (1937), 157 L. T. R. 118 . . . . .	219-20
Rex v. Minister of Health; <i>ex parte</i> Villiers, [1936] 2 K. B. 29 . . . . .	182n.
Rex v. Minister of Health; <i>ex parte</i> Wortley R. D. C., [1927] 2 K. B. 229 . . . . .	58n.
Rex v. Minister of Labour, [1932] 1 K. B. 1 . . . . .	55n.
Rex v. Minister of Transport (1931), 144 L. T. R. 700 . . . . .	268n.
Rex v. Minister of Transport; <i>ex parte</i> H. C. Motor Works, Ltd., [1927] 2 K. B. 401 . . . . .	196
Rex v. Minister of Transport; <i>ex parte</i> Upminster Services, Ltd., [1934] 1 K. B. 277 . . . . .	197-98
Rex v. Ministry of Health; <i>ex parte</i> Wycombe Guardians (1922), 92 L. J. K. B. 373 . . . . .	198n.
Rex v. Nat. Bell Liquors, Ltd., [1922] 2 A. C. 128 . . . . .	160n.
Rex v. Paddington and St. Marylebone Rent Tribunal, [1948] 2 K. B. 413 . . . . .	101n.
Rex v. Recorder of Bolton, [1940] 1 K. B. 290 . . . . .	219n.
Rex v. Shoreditch Assessment Committee, [1910] 2 K. B. 859 . . . . .	298n.
Rex v. Superintendent of Vine Street Police Station, [1916] 1 K. B. 268 . . . . .	316n.
Rex v. Sussex Justices, [1924] 1 K. B. 256 . . . . .	249n.
Rex v. Westminster Assessment Committee, [1941] 1 K. B. 53 . . . . .	268n.
Rex v. Woodhouse, [1906] 2 K. B. 501 . . . . .	160n.
Ringer, <i>Ex parte</i> (1909), 25 T. L. R. 718 . . . . .	189, 190, 191, 193
Ripon Housing Order, <i>Re</i> , [1939] 1 All E. R. 508 . . . . .	302n.
Roberts v. Hopwood, [1925] A. C. 578 . . . . .	168n.
Robins & Son, Ltd., v. Minister of Health, [1939] 1 K. B. 520 . . . . .	265n.
Robinson & Co. v. Rex, [1921] 3 K. B. 183 . . . . .	315n.
Robinson v. Mayor of Sunderland (1898), 78 L. T. R. 194 . . . . .	218n.



Robinson v. Minister of Town and Country Planning, [1947]	K. B.	
702 . . . . .	275n., 291n., 334n.	
Rodwell v. Minister of Health, [1947]	K. B. 404 . . . . .	297n.
Rollo v. Minister of Town and Country Planning, [1948]	1 All E. R. 13	269n.
Rowell & Pratt, [1936]	2 K. B. 226, [1938] A. C. 101 . . . . .	96n., 98n.
Russell v. Duke of Norfolk, [1949]	1 All E. R. 109 . . . . .	258n.
Russian Bank for Foreign Trade v. Excess Insurance Co., Ltd., [1918]	2 K. B. 123 . . . . .	318n.
Ryall v. Cubbitt Heath, [1922]	1 K. B. 275 . . . . .	219n.
Ryall v. Hart, [1923]	2 K. B. 464 . . . . .	218
Rylands v. Fletcher (1868), L. R. 3 H. L.	330 . . . . .	147
Sainsbury v. Saunders (1918), 88 L. J. K. B.	441 . . . . .	315n.
St. Lucia Usines Co. v. Colonial Treasurer, [1924]	A. C. 508 . . . . .	198n.
Sharp v. Wakefield, [1891]	A. C. 173 . . . . .	77n.
Shutler v. Rolfe (1920), 36 T. L. R.	828 . . . . .	315n.
Simeon, <i>In re</i> J. W. B., [1935]	2 K. B. 183 . . . . .	268n.
Smart & Son v. Watts, [1895]	1 Q. B. 219 . . . . .	218n.
Smith v. Richmond, [1899]	A. C. 448 . . . . .	297n.
Sparks v. Edward Ash, Ltd., [1943]	K. B. 223 . . . . .	174-76, 201
Sprigg v. Sigcau, [1897]	A. C. 238 . . . . .	167n.
Stafford v. Minister of Health, [1946]	K. B. 621 . . . . .	226-28
Star Tea Co. v. Davies (1918), 88 L. J. K. B.	192 . . . . .	315n.
Stiles v. Galinski, [1904]	1 K. B. 615 . . . . .	57n.
Stock v. Central Midwives Board, [1915]	3 K. B. 756 . . . . .	258n.
Stocker v. Minister of Health, [1938]	1 K. B. 655 . . . . .	290n.
Stourbridge U. D. C. v. Butler & Grove (1909), 99 L. T. R.	912 . . . . .	219n.
Summers v. Minister of Health, [1947]	1 All E. R. 184 . . . . .	267n.
Swift & Co. v. Board of Trade, [1925]	A. C. 520 . . . . .	315n.
Tilonko v. Attorney-General of Natal, [1907]	A. C. 93 . . . . .	312n.
Trim v. Sturminster R. D. C. (1938), 159 L. T. R.	7 . . . . .	297n.
Trunk Roads Act, 1936, <i>In re</i> the, [1939]	2 K. B. 515 . . . . .	273n.
Urban Housing Co. v. Oxford C. C., [1939]	4 All E. R. 211 . . . . .	223n.
Venicoff, <i>Ex parte</i> , [1920]	3 K. B. 72 . . . . .	85-86
Walthamstow Local Board v. Staines, [1891]	2 Ch. 606 . . . . .	198n.
Welch v. Russell (1918), 87 L. J. K. B.	1038 . . . . .	315n.
West Midlands Joint Electricity Co. v. Pitt, [1932]	2 K. B. 1 . . . . .	168n.
Whatling v. Rees (1915), 112 L. T. R.	512 . . . . .	219
White and Collins v. Minister of Health, [1939]	2 K. B. 838 . . . . .	301-3
White v. St. Marylebone Borough Council, [1915]	3 K. B. 249 . . . . .	293-94
Whitham & Butterworth v. Lindley (1920), 37 T. L. R.	75 . . . . .	315n.
Wilford v. West Riding of Yorkshire C. C., [1908]	1 K. B. 685 . . . . .	195n.
Wilkinson v. Barking Corp., [1948]	1 K. B. 721 . . . . .	77n., 275n.
Williams v. Pearce (1916), 85 L. J. K. B.	959 . . . . .	315n.
Wilts v. United Dairies, Ltd. (1922), 91 L. J. K. B.	897 . . . . .	320n., 322-23
Wirral Rural Council v. Carter, [1903]	1 K. B. 646 . . . . .	218
Wood v. Widnes Corp., [1898]	1 Q. B. 463 . . . . .	219n.
Wood v. Woad (1874), L. R. 9 Ex.	190 . . . . .	222

# TABLE OF CASES

371

	PAGE
Yoxford and Darsham Farmers' Association v. Llewellyn (1945), 61 T.	
L. R. 461 . . . . .	323n.
Zamora, The, [1916] 2 A. C. 77 . . . . .	320n., 344n.

## AMERICAN

Adkins v. Children's Hospital, 261 U. S. 525 (1923) . . . . .	148
Alabama Power Co. v. City of Fort Payne, 237 Ala. 459 (1939) . . . . .	289n.
American Federation of Labor v. National Labor Relations Board, 308 U. S. 401 (1940) . . . . .	70n.
Bi-Metallic Investment Co. v. State Board, 239 U. S. 441 (1915) . . . . .	223n.
Block v. Hirsch, 256 U. S. 135 (1921) . . . . .	354n.
Bowles v. Willingham, 321 U. S. 503 (1944) . . . . .	342n.
Boyle, <i>In re</i> , 6 Idaho 609 (1899) . . . . .	309n.
Brig Aurora, 7 Cranch 382 (1813) . . . . .	31
Carlay Co. v. Federal Trade Com'n., 153 F. (2d) 493 (C. C. A. 7th 1946) . . . . .	279n.
Carter v. Carter Coal Co., 298 U. S. 238 (1936) . . . . .	95, 96, 257
Chin Yow v. United States, 208 U. S. 8 (1908) . . . . .	87n.
Commonwealth <i>ex rel.</i> Wadsworth v. Shortall, 206 Pa. 165 (1903) . . . . .	309n.
Consolidated Edison Co. v. National Labor Relations Board, 309 U. S. 197 (1938) . . . . .	279n., 291
Cox v. McNutt, 12 F. Supp. 355 (S. D. Ind. 1935) . . . . .	309n.
Crowell v. Benson, 285 U. S. 22 (1932) . . . . .	293, 299, 300, 302, 303
Dobson v. Commissioner, 320 U. S. 489 (1944) . . . . .	95, 282, 283, 286
Duncan v. Kahanamoku, 327 U. S. 304 (1946) . . . . .	346n.
Endo, <i>Ex parte</i> , 323 U. S. 283 (1944) . . . . .	362-63
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134 (1940) . . . . .	23n., 199n., 212n., 235n.
Federal Trade Commission v. Gratz, 253 U. S. 421 (1920) . . . . .	222, 292
Field v. Clark, 143 U. S. 649 (1892) . . . . .	31, 32, 50n.
Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146 (1919) . . . . .	354n.
Hampton, Jr., J. W., & Co. v. United States, 276 U. S. 394 (1928) . . . . .	32, 50n.
Hearon v. Calus, 178 S. C. 381 (1935) . . . . .	309n.
Hirabayashi v. United States, 320 U. S. 81 (1943) . . . . .	305n., 348, 358, 359n., 360-61, 362, 363
Home Building and Loan Association v. Blaisdell, 290 U. S. 398 (1933) . . . . .	340n.
Humphrey's Executor v. United States, 295 U. S. 602 (1935) . . . . .	21n., 26n.
Interstate Commerce Commission v. Baird, 194 U. S. 25 (1904) . . . . .	235n.
Ives v. South Buffalo Ry. Co., 201 N. Y. 271 (1911) . . . . .	148
Jackson v. People, 9 Mich. 111 (1860) . . . . .	158n.
Karlinski, Matter of, 180 Misc. 44 (N. Y. Surr. Ct. 1943) . . . . .	343n.
Korematsu v. United States, 140 F. (2d) 289 (C. C. A. 9th, 1943), 323 U. S. 214 (1944) . . . . .	307n., 308n., 335, 361, 362
Lichter v. United States, 334 U. S. 742 (1948) . . . . .	343n.
Londoner v. Denver, 210 U. S. 373 (1908) . . . . .	216n.
Luther v. Borden, 7 How. 1 (1849) . . . . .	344n.
McDonald, <i>Ex parte</i> , 49 Mont. 454 (1914) . . . . .	309n.

	PAGE
McKinley v. United States, 249 U. S. 397 (1919) . . . . .	354n.
Malone v. City of Quincy, 66 Fla. 52 (1913) . . . . .	288n.
Martin v. Mott, 12 Wheat. 19 (1827) . . . . .	344n.
Miller v. Rivers, 31 F. Supp. 540 (M. D. Ga. 1935) . . . . .	309n.
Miller v. United States, 11 Wall. 268 (1870) . . . . .	340
Milligan, <i>Ex parte</i> , 4 Wall. 2 (1866) . . . . .	305-9, 339, 343n., 352
Mississippi Barge Line Co. v. United States, 292 U. S. 282 (1934) . . . . .	279n.
Mitchell v. Harmony, 13 How. 115 (1851) . . . . .	343n.
Morgan v. United States, 304 U. S. 1 (1938) . . . . .	236n., 251
Morgan v. United States, 298 U. S. 468 (1936) . . . . .	238-40
Moyer, <i>In re</i> , 35 Colo. 159 (1905) . . . . .	309n.
Moyer v. Peabody, 212 U. S. 78 (1909) . . . . .	344, 345
Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1855) . . . . .	216n.
Muskat v. United States, 219 U. S. 346 (1911) . . . . .	202
Myers v. United States, 272 U. S. 52 (1926) . . . . .	16n.
National Labor Relations Board v. Hearst Publications, 322 U. S. 111 (1944) . . . . .	292-93, 294
Ng Fung Ho v. White, 259 U. S. 276 (1922) . . . . .	87n., 303n.
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920) . . . . .	298-99, 300
Pacific States Box and Basket Co. v. White, 296 U. S. 175 (1935) . . . . .	173n.
Panama Refining Co. v. Ryan, 293 U. S. 389 (1935) . . . . .	15n., 27n.
Patten v. Miller, 190 Ga. 105 (1940) . . . . .	309n.
Perlstein v. United States, 57 F. Supp. 123 (M. D. Pa. 1944) . . . . .	308n.
Prize Cases, 2 Bl. 635 (1863) . . . . .	351-52
Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573, 311 U. S. 570 (1940) . . . . .	299n.
St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 (1936) . . . . .	200, 212, 279n., 299, 304
Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935) . . . . .	27n., 28, 29, 30, 34, 48, 61, 341, 342, 355
Schuller v. Drum, 51 F. Supp. 383 (E. D. Pa. 1943) . . . . .	352n.
Selective Draft Law Cases, 245 U. S. 366 (1918) . . . . .	354n.
Self Insurers Association v. State Industrial Commission, 224 N. Y. 13 (1918) . . . . .	202, 203
Social Security Board v. Nierotko, 327 U. S. 358 (1946) . . . . .	301n.
Southern Railway Co. v. Virginia, 290 U. S. 190 (1933) . . . . .	161
Southern Steamship Co. v. National Labor Relations Board, 316 U. S. 31 (1942) . . . . .	169-70
Springer v. Philippine Islands, 277 U. S. 189 (1928) . . . . .	26n.
Stark v. Wickard, 321 U. S. 288 (1944) . . . . .	166n.
State v. Jensen, 205 Minn. 410 (1939) . . . . .	288n.
Sterling v. Constantin, 287 U. S. 378 (1932) . . . . .	345-46, 348
Stuart v. Palmer, 74 N. Y. 183 (1878) . . . . .	216n.
Switchmen's Union v. National Mediation Board, 320 U. S. 297 (1943) . . . . .	70n.
Trust of Bingham v. Commissioner, 325 U. S. 365 (1945) . . . . .	281n.
Tumey v. Ohio, 273 U. S. 510 (1927) . . . . .	253n.

## TABLE OF CASES

373

	PAGE
Tutun v. United States, 270 U. S. 568 (1926) . . . . .	85
United States <i>ex rel.</i> Wessels v. McDonald, 265 Fed. 754 (E. D. N. Y. 1920) . . . . .	308n.
United States v. Chicago, etc., R. R., 282 U. S. 311 (1931) . . . . .	28n.
United States v. Cohen Grocery Co., 255 U. S. 81 (1921) . . . . .	354n.
United States v. Curtiss-Wright Export Corp., 299 U. S. 304 (1936) . . . . .	343n.
United States v. Grimaud, 220 U. S. 506 (1911) . . . . .	26n.
United States v. Macintosh, 283 U. S. 605 (1930) . . . . .	339n.
United States v. Minoru Yasui, 48 F. Supp. 40 (D. Ore. 1942) . . . . .	309n.
United States v. Morgan, 313 U. S. 409 (1941) . . . . .	271n.
United States v. Morgan, 307 U. S. 183 (1939) . . . . .	13n.
United States v. Phillips, 33 F. Supp. 261 (N. D. Okla. 1940) . . . . .	309n.
Ventura, <i>Ex parte</i> , 44 F. Supp. 520 (W. D. Wash. 1942) . . . . .	307n.
Waite v. Macy, 246 U. S. 606 (1918) . . . . .	55
Wallace v. Feehan, 206 Ind. 522 (1934) . . . . .	173n.
Wayman v. Southard, 10 Wheat. 1 (1825) . . . . .	26n.
Yakus v. United States, 321 U. S. 414 (1944) . . . . .	
51n., 99n., 211, 335, 341-43, 356, 357n.	
Yamataya v. Fisher, 189 U. S. 86 (1903) . . . . .	229n.
Yick Wo v. Hopkins, 118 U. S. 356 (1886) . . . . .	173-74

# TABLE OF STATUTES

## BRITISH

	PAGE
1834	
Poor Law Amendment Act . . . . .	34, 49, 62, 208
1844	
Poor Law Amendment Act . . . . .	168
1854	
Railway and Canal Traffic Act . . . . .	176
1868	
Sale of Poisons Act . . . . .	55
1870	
Extradition Act . . . . .	63
1872	
Intoxicating Liquor (Licensing) Act . . . . .	55
1873	
Railway and Canal Traffic Act . . . . .	92
1874	
Customs and Inland Revenue Act . . . . .	283
1875	
Public Health Act . . . . .	71-74, 193, 219, 229
1876	
Customs Consolidation Act . . . . .	56
1888	
Local Government Act . . . . .	58
Patents, Designs and Trade Marks Act . . . . .	62, 177
Railway and Canal Traffic Act . . . . .	92
1889	
Arbitration Act . . . . .	171
1890	
Housing of the Working Classes Act . . . . .	36
1893	
Rules Publication Act . . . . .	121, 133, 135, 136, 137, 138, 139, 141
1894	
Local Government Act . . . . .	58, 208, 209
1896	
Coal Mines Regulation Act . . . . .	217
1897	
Cotton Cloth Factories Act . . . . .	49
Weights and Measures (Metric System) Act . . . . .	55
1902	
Education Act . . . . .	194
1903	
Housing of the Working Classes Act . . . . .	37
1906	
Waterford Bridge Act . . . . .	192

# TABLE OF STATUTES

375

	PAGE
1908	
Small Holdings and Allotments Act . . . . .	189
1909	
Housing, Town Planning, &c., Act . . . . .	37, 218, 236, 263, 294
1911	
Cotton Cloth Factories Act . . . . .	49
National Health Insurance Act . . . . .	59, 60, 137
1914	
Aliens Restriction Act . . . . .	86
Defence of the Realm Act . . . . .	314, 316, 318, 320, 322
Defence of the Realm Consolidation Act . . . . .	314
1916	
Military Service Act . . . . .	58
1918	
Income Tax Act . . . . .	95, 283
1919	
British Nationality and Status of Aliens Act . . . . .	85
Electricity Supply Act . . . . .	180
Government of India Act . . . . .	126
Housing (Additional Powers) Act . . . . .	224
Ministry of Health Act . . . . .	72, 126, 136, 168
Nurses Registration Act . . . . .	126
1920	
Air Navigation Act . . . . .	33
Roads Act . . . . .	74, 75, 196
1921	
Railways Act . . . . .	93
1924	
London Traffic Act . . . . .	90
National Health Insurance Act . . . . .	88
1925	
Administration of Justice Act . . . . .	136
Housing Act . . . . .	63, 183, 185, 189, 201
Rating and Valuation Act . . . . .	57, 59
Town Planning Act . . . . .	39
1926	
Public Health (Smoke Abatement) Act . . . . .	55
1927	
Poor Law Act . . . . .	58
1929	
Factories and Workshops (Cotton Cloth Factories) Act . . . . .	49
Local Government Act . . . . .	41, 59
1930	
Housing Act . . . . .	208-9, 231, 264, 287
Land Drainage Act . . . . .	60, 209
Mental Treatment Act . . . . .	105
Public Works Act . . . . .	209
Road Traffic Act . . . . .	48, 74, 76, 77, 197
1931	
Abnormal Importations (Customs Duties) Act . . . . .	51
Agricultural Marketing Act . . . . .	96

## 1932

Import Duties Act . . . . .	52
Merchant Shipping (Safety and Load Line Conventions) Act . . . . .	33
Wheat Act . . . . .	170

## 1933

Administration of Justice Act . . . . .	155
Local Government Act . . . . .	61, 209, 210, 231
Road and Rail Traffic Act . . . . .	94

## 1934

Water Supplies (Exceptional Shortage Orders) Act . . . . .	209, 231
--	----------

## 1935

Government of India Act . . . . .	126
Housing Act . . . . .	219
Special Areas (Development and Improvement) Act . . . . .	209, 232
Unemployment Insurance Act . . . . .	79, 210

## 1936

Air Navigation Act . . . . .	209, 232
Housing Act . . . . .	184, 209, 221, 226, 231, 234, 294, 300, 303
National Health Insurance Act . . . . .	40, 80, 89
Public Health Act . . . . .	61, 71
Public Health (London) Act . . . . .	210
Trunk Roads Act . . . . .	273
Widows', Orphans', and Old Age Contributory Pensions Act . . . . .	79

## 1937

Livestock Industry Act . . . . .	210
----------------------------------	-----

## 1938

Administration of Justice Act . . . . .	155
Coal Act . . . . .	210
Sea Fish Industry Act . . . . .	210

## 1939

Civil Defence Act . . . . .	325
Coast Protection Act . . . . .	210
Control of Employment Act . . . . .	321, 325
Courts (Emergency Powers) Act . . . . .	325
Currency (Defence) Act . . . . .	325
Defence (Compensation) Act . . . . .	323
Emergency Powers (Defence) Act . . . . .	320-25, 327, 328, 330
Essential Buildings and Plants (Repair of War Damage) Act . . . . .	325
Execution of Trusts (Emergency Provisions) Act . . . . .	325
Housing (Emergency Powers) Act . . . . .	325
Import, Export and Customs Powers (Defence) Act . . . . .	325
Landlord and Tenant (War Damage) Act . . . . .	325
Ministry of Supply Act . . . . .	325
National Loans Act . . . . .	325
National Registration Act . . . . .	325
National Service (Armed Forces) Act . . . . .	321, 325
Navy and Marines (Wills) Act . . . . .	325
Patents, Designs, Copyright and Trade Marks (Emergency) Act . . . . .	325
Personal Injuries (Emergency Provisions) Act . . . . .	325
Prices of Goods Act . . . . .	325
Prize Act . . . . .	325
Rent and Mortgage Interest Restrictions Act . . . . .	99, 325
Reserve and Auxiliary Forces Act . . . . .	325

## TABLE OF STATUTES

377

	PAGE
Ships and Aircraft (Transfer Restriction) Act . . . . .	325
Trading with the Enemy Act . . . . .	325
War Risks Insurance Act . . . . .	325
1940	
Emergency Powers (Defence) Act . . . . .	321
Emergency Powers (Defence) (No. 2) Act . . . . .	321
1942	
United States of America (Visiting Forces) Act . . . . .	53
1943	
Nurses Act . . . . .	210
Pensions Appeal Tribunals Act . . . . .	82, 210
1944	
Education Act . . . . .	210, 232
Housing (Temporary Provisions) Act . . . . .	226, 227
Indemnity Act . . . . .	109
Town and Country Planning Act . . . . .	210, 275
1945	
Bretton Woods Agreements Act . . . . .	33
Distribution of Industry Act . . . . .	210, 232
Representation of the People Act . . . . .	61
Requisitioned Land and War Works Act . . . . .	262
Statutory Orders (Special Procedure) Act . . . . .	232
Supplies and Services (Transitional Powers) Act . . . . .	324
Water Act . . . . .	210, 232
1946	
Acquisition of Land (Authorisation Procedure) Act . . . . .	210, 232
Coal Industry Nationalisation Act . . . . .	66-67
Furnished Houses (Rent Control) Act . . . . .	98
National Health Service Act . . . . .	40, 89-90
National Insurance Act . . . . .	40, 79
New Towns Act . . . . .	210, 232, 269-76
Statutory Instruments Act . . . . .	108-9, 110, 116, 121, 134, 138
Trunk Roads Act . . . . .	232
1947	
Agriculture Act . . . . .	210, 232
Crown Proceedings Act . . . . .	152, 157
Town and Country Planning Act . . . . .	210, 232
Transport Act . . . . .	92, 94
1948	
Gas Act . . . . .	210, 232
Local Government Act . . . . .	61
National Assistance Act . . . . .	34, 82
1949	
Landlord and Tenant (Rent Control) Act . . . . .	99

## AMERICAN

1914	
Federal Trade Commission Act . . . . .	27
1917	
Espionage Act . . . . .	353
Food and Fuel Control Act . . . . .	354
Trading with the Enemy Act . . . . .	354



	PAGE
1918	
Overman Act . . . . .	354, 355
1920	
Tariff Act . . . . .	32
1927	
Longshoremen's and Harbor Workers' Compensation Act . . . . .	299
1930	
Tariff Act . . . . .	50
1933	
National Industrial Recovery Act . . . . .	27, 30, 95, 342
1935	
Federal Register Act . . . . .	133, 134
National Labor Relations Act . . . . .	169, 292
1938	
Fair Labor Standards Act . . . . .	172n.
1939	
Reorganization Act . . . . .	131
1940	
Selective Training and Service Act . . . . .	355, 356
1941	
First War Powers Act . . . . .	355
1942	
Emergency Price Control Act . . . . .	99, 211, 341-42, 356, 357
Stabilization Act . . . . .	356
1943	
War Labor Disputes Act . . . . .	356
1946	
Administrative Procedure Act . . . . .	73, 131-32, 133, 138, 139, 140, 141, 232, 242-43, 244, 249, 252-53, 256, 263, 268

## INDEX

- Abercrombie, Sir P., 269
- Access to courts, right of, 179, 319
- Administrative decisions. *See* Ministers' Powers, Committee on
- Administrative justice:
- advantages and defects, 70
  - extreme instance, 74
  - guild agencies, 95
  - hierarchy of tribunals, 79
  - limited judicial control, 75
  - penalties, power to impose, 88-90, 97, 256-57
  - reaction to inadequacy of courts, 69, 77, 98
  - reason for, 76
  - reliance upon by Labor Government, 98
  - Rent Tribunals, 99-101
  - specialized courts of law, 91-95
  - state benefits, 77-82
  - trend toward, 68, 98
  - United States, 78
- Administrative Management, President's Committee on, United States, 255
- Administrative process:
- courts, compared to, 12
  - decision, method of, 230-35
  - public-service concept, relation to, 19
- Administrative publicity, 132
- Admiralty, 258
- Advisory opinions, 202-4
- Affirmative resolution. *See* Statutory Instruments, Parliamentary control of
- Agricultural Marketing Act, Report on, 205n.
- Agriculture, Board of, 136n., 189
- Agriculture, Department of, United States, 238, 246, 251
- Air Navigation (Amendment) (Ministry of Civil Aviation) (Provisional) Order, 1945, 119
- Aliens:
- deportation of, 86-87
  - enemy, 321, 360
  - naturalization of, 85
- Allen, C. K., 14n., 34n., 35n., 38n., 43n., 50, 57n., 61n., 103n., 105n., 106, 107, 109, 112n., 115n., 120, 123n., 124, 125n., 128, 129n., 136n., 153n., 176n., 177n., 180n., 183n., 186n., 188n., 204n., 205, 206n., 208n., 232, 241n., 248, 252, 257, 267n., 280n., 318n., 321n., 326, 327n., 332n., 333, 334n.
- Alverstone, Lord, C.J., 218
- Anderson, Sir J., 84n.
- Antecedent publicity, 135-40
- "Ante-natal safeguards," 138
- Appeals, 155, 208-11
- Aristotle, 1
- Atkin, Lord, 157, 160, 303n., 330-31, 332, 333, 334, 347-48
- Atkinson, Lord, 287n., 293, 317n.
- Attorney General's Committee on Administrative Procedure, United States, 30n., 45, 132, 140, 141n., 143n., 145n., 146n., 198, 199, 200n., 210n., 216n., 226n., 228n., 230n., 232n., 235n., 240n., 244n., 246, 252n., 253n., 254, 255, 262n., 268n., 278n., 290
- Austin, J., 214
- Avory, J., 198n., 249n., 318, 319
- Bailhache, J., 140, 318
- Bankes, L.J., 182
- Belfast Gazette*, 54
- Benjamin, R., 280n.
- Berdahl, C., 350n., 353n., 354n.

## Bias:

- Agricultural Marketing Boards, 256-57
- concentration of functions, 97, 254-57, 262-64, 273, 275-76
- deciding officers, insulation of, 268
- departmental, 22, 257, 259-62, 269-76
- disqualifies, degree that, 253-54
- pecuniary, 253, 257
- proper significance, 274
- See also* Ministers' Powers, Committee on; Natural justice
- Black, J., 361n.
- Blackstone, Sir William, 6
- Blank cheque. *See* Delegated legislation
- Bodenheimer, E., 2n., 8n., 9n.
- Bohlen, F., 147n., 295
- Borchard, E., 163n.
- Bowen, L.J., 178n., 213, 254n.
- Brandeis, J., 16, 85, 87n., 200, 212, 245, 278
- Bruce, J., 217
- Buckley, L.J., 243, 246-47, 248n.
- Buckmaster, Lord, 285
- Burke, E., 22
- Bylaws. *See* Judicial control
- Campbell, J., 158, 159
- Campbell, Lord, C.J., 176
- Campion, Sir G., 102n., 103n., 105, 112n., 122, 123, 124, 125
- Cardozo, J., 15, 28, 147n., 148, 149n., 202n., 203, 279n.
- Carr, Sir Cecil, 5n., 31n., 43n., 45n., 50, 51n., 53n., 55n., 90n., 117, 118, 119, 123n., 124, 125, 133n., 134, 136n., 137, 138n., 142, 231, 233n., 237n., 261n., 277, 319, 323n.
- Cave, Viscount, L.C., 229-30, 253, 285
- Certiorari, 144, 155, 157-61, 168, 209
- Charles, J., 227, 302
- Chase, C.J., 307
- Civil Aviation, Minister of, 119
- Civil Liberties, National Council for, 326n.

Civil War, United States. *See* War power

- Clauson, L.J., 328
- Collins, Henn, J., 271, 275
- Comer, J. P., 31n., 107n.
- Committee stage of bills, 127-28
- Commons, House of, 52, 110, 111, 112, 113, 114, 116, 122, 126, 270, 323
- Compulsory purchase, 206, 226, 231, 262-63, 264-65, 269, 274, 276, 301
- Concentration of functions. *See* Bias
- Conclusive-evidence clause. *See* Delegated legislation; Ministers' Powers, Committee on; *Ultra vires*
- Congress, control by, 131
- Conscription of industry, 355, 356
- Constitution, British, derived from judicial decisions, 151
- Constitution, United States, 49, 62, 161, 173, 202, 212, 228, 278, 300, 339-40, 362
- Constitutional fact. *See* Scope of review
- Contingent legislation. *See* Delegated legislation
- Cotton, L.J., 254
- Courts. *See* Judicial control
- Crookshank, Captain, M.P., 118n.
- Cushman, R., 26, 91, 92n., 93n., 95
- Customs legislation. *See* Delegated legislation
- Darling, J., 189
- Davis, J., 306, 307, 308, 309, 352
- Davison, J. F., 44
- Day, J., 202
- Declaratory judgments, 162-64
- Defence of the Realm Regulations. *See* War power
- Defence Regulations. *See* War power
- Delegated legislation:
  - application, 53
  - blank-cheque type, 34
  - commencement, 53
  - comparison, United States and British practice, 30-31

- conclusive-evidence clause, 63-64, 120, 129, 188-94
- contingent legislation, 31-34, 53
- criticism after World War, 42
- customs legislation, 50-52
- defined, 30
- "effect as if enacted in this Act," 63, 120, 129, 176-88
- exceptional type, 48, 105, 127, 129
- extension-restriction, 55
- Henry VIII clause, 53, 57-61
- immunity from judicial control, 62
- implementation of socialist doctrine, 65
- international conventions, 32-34, 53
- Labor Government, views of, 47, 64
- mechanical powers of amendment, 54
- nomenclature, confusion of, 107
- normal type, 48, 127
- obscurity of language, 121
- penalties, imposition of, 90-91
- power to amend acts, 52-61
- principle and detail, 47, 48, 49, 103
- publication, 133-35
- pure machinery provisions, 35
- retrospective effect, 119-20
- skeleton legislation, 34, 38, 39, 40, 47, 49
- standards, 27, 28
- subordinate character, 127, 162
- subordinate legislation, 31, 34
- tax, power to, 50
- town planning enactments, 39
- United States constitutional background, 25-29
- unlimited discretion, 62
- See also* Ministers' Powers, Committee on; Natural justice; Statutory Instruments; War power
- Delegation:
  - classic reasons for, 46, 51
  - department heads, by, 238
  - maxim against, 25, 28
- De novo*, review. *See* Scope of review
- Departmental decisions, 78, 79, 225, 230-35, 237-38, 240-42, 244
- Department of Inspectors, 263
- Deportation. *See* Aliens
- DeSmith, S. A., 160n.
- Dicey, A. V., 3, 11, 12, 13, 17, 43, 44, 65, 150, 151
- Dickinson, J., 2n., 12n., 17n., 21n., 156n., 281, 297n.
- Disappearance of law theories, 4-9:
  - National Socialist, 5-7
  - Soviet, 5, 7-9
- Discretion, unlimited. *See* Delegated legislation
- Disqualification. *See* Bias
- Dodd, C., 311n., 312n.
- Domestic tribunals, 98, 258
- Donoughmore Committee. *See* Ministers' Powers, Committee on
- Donoughmore, Earl of, 43, 111, 123
- D. O. R. A., 314
- Douglas, J., 358, 361, 363
- Dublin Gazette*, 54
- Due process, procedural, 212, 216, 223, 228
- Duguit, L., 14n., 18, 19n.
- Dunedin, Viscount, 178n., 186
- Dunning, W., 349n., 350n.
- DuParcq, L. J., 286
- Earl, J., 216n.
- Education, Board of, 192, 198n., 235
- "Effect as if enacted in this Act." *See* Delegated legislation; *Ultra vires*
- Ejusdem generis* rule, 56
- Electricity Commissioners, 180
- Eleven-o'clock rule, 111
- Emergency power. *See* War power
- Engels, F., 7n., 8
- Esher, Lord, M.R., 73, 88, 223, 300
- Eve, J., 241
- Evidence. *See* Natural justice
- Excessive prescribing, 88
- Executive discretion, 77, 85, 87
- Executive finality, 70, 71, 74, 75, 76, 79, 185, 190, 194-98, 205, 298, 303-4, 317, 337, 339, 343-44
- Executive justice. *See* Administrative justice
- Executive power:
  - expansion of, 24-25

- substitute for law, 8  
*See also* Administrative justice;  
 Delegated legislation; Law; War  
 power
- Exempted business, 111, 112
- Expert:  
 limitations of, 145  
 role of, 145
- Fact, questions of. *See* Scope of re-  
 view; *Ultra vires*
- Fairman, C., 309n., 344n., 345n.,  
 352n.
- Farnsworth, A., 283n., 286n.
- Farwell, L.J., 163, 195, 196, 198, 241,  
 297n.
- Federal Register, United States, 53,  
 138
- Federal Trade Commission, United  
 States, 292
- Field, J., 230n.
- Fifth column, 337, 358
- Finance and Industry, Committee on,  
 102n.
- Findings, 141
- Finlay, Lord, L.C., 315n., 331, 332
- Fisher, Sir W., 43, 207, 261n.
- Fletcher, E., M.P., 138n.
- Fraenkel, E., 5, 6n.
- Frank, H., 6n.
- Frankfurter, F., 44n., 199, 203n.,  
 212n., 235n., 281n., 282n., 335n.
- Frederick the Great, 6
- Freund, E., 158
- Fuel and Power, Minister of, 66, 338
- Fundamentals of fair play, 23, 84,  
 212, 228
- Gény, F., 10
- Goddard, Lord, C.J., 101, 121n., 159
- Goodhart, A. L., 332n.
- Greene, Lord, M.R., 70n., 294n., 296,  
 338
- Greer, L.J., 159, 198n., 266, 267
- Gregory, Sir R., 91n., 241, 248n.,  
 263n.
- Guild agencies. *See* Administrative  
 justice; Marketing Boards
- "Guillotine," 128
- Gwyer, Sir M., 45n., 59n., 60n., 112n.,  
 113, 179n., 205n., 225n., 231n.,  
 247n., 260n.
- Habeas corpus, 306, 316, 348, 350,  
 351, 352, 362
- Haldane, Lord, L.C., 237
- Hamilton, A., 341n.
- Hanworth, Lord, M.R., 184
- Harlan, J., 228
- Harrison, Sir William Graham, 34n.,  
 106, 109, 115, 125, 178, 180n.
- Hart, J., 353n.
- Hayek, F., 20
- Health, Minister of, 36, 39, 57, 63, 72,  
 79, 80, 81, 82, 88, 89, 90, 100,  
 106, 136, 161, 183, 185, 202,  
 205, 206, 208, 218, 221, 224,  
 226, 231, 233n., 260-62, 264,  
 268, 273, 289, 301, 303
- Hearing. *See* Natural justice; Public  
 local inquiry
- Hearing officers. *See* Inspectors
- Henry VIII clause. *See* Delegated  
 legislation
- Herbert, Sir D., 114, 115, 127
- Herschell, Lord, L.C., 168, 177-79,  
 187
- Hetherington, R. G., 248n.
- Hewart, Lord, C.J., 11n., 15, 41, 42n.,  
 44, 45, 56, 57n., 58n., 71n.,  
 154n., 180, 184, 191n., 204n.,  
 219n., 220, 240n., 249, 273
- Hill, H. A., 167n., 168n., 180n.
- Hipwood, Sir C., 32n.
- Hitler, A., 6n.
- Hoare, Sir S., 326
- Holdsworth, Sir William, 3n., 17, 43,  
 310n., 329
- Holmes, J., 26, 55, 223n., 344
- Home Secretary, 85, 86, 87, 92, 110n.,  
 119, 326, 329-35, 347
- Home Security, Minister of, 322
- Housing acts:  
 appeals, 208-11, 270  
 Health, Minister of, position of,  
 260-62  
*See also* Public local inquiry; Scope  
 of review

- Housing scheme, procedure by, 36  
 Hughes, C.J., 27, 68, 251, 279n.,  
 280n., 302, 340, 346, 348
- Ihering, R., 1, 9, 101  
 Ilbert, Sir C., 90  
 Imperative theories. *See* Law; State  
 Import Duties Advisory Committee, 52  
 Income-tax cases. *See* Scope of review  
 Income-Tax, Special Commissioners of,  
 94-95, 283  
 India and Burma Orders, Lords Select  
 Committee on, 126  
 Injunctions, 157n.  
 Inspectors:  
   hearing officers, United States, com-  
   pared, 232  
   qualifications, 73, 232, 244  
   reports, 73, 234, 237, 243, 245,  
   247-50  
   reports, United States parallels,  
   249-51  
   role, 243-44  
 Insurance acts. *See* Judicial control  
 Insurance Commissioners, 60, 137n.  
 International conventions. *See* Dele-  
 gated legislation  
 Interstate Commerce Commission,  
   United States, 92, 154, 246  
 Isaacs, N., 281n.
- Jackson, J., 282  
 Jaffe, L., 45n., 282n.  
 Japanese evacuation. *See* War power  
 Jennings, W. I., 2n., 3, 20n., 44n.,  
 201n., 322n., 323, 324n.
- Judicial control:  
   bylaws, local, 174  
   courts, inadequacy of, 143-44, 152-  
   53  
   early development, 176  
   functions, 198-201  
   insurance acts, 80-82, 154  
   judicial inexperience, 144-46  
   judicial justice, defects, 152-53  
   jurisdictional theory, 124, 156, 157,  
   201  
   legal doctrine, inadequacy of, 146  
   need for, 22, 70, 77, 78, 143, 166-  
   68, 169, 190-91, 194, 225  
   policy, 168-72  
   relation to rule of law, 17  
   review, nonstatutory, 75, 155, 156,  
   157, 196, 210  
   review, statutory, 155, 208-11  
   Robson's, Dr., views, 143-44  
   self-imposed limitations, 70, 165  
   time limitations upon review, 205-  
   11, 357n.  
   *See also* Certiorari; Declaratory  
   judgments; Injunctions; Man-  
   damus; Prohibition; Scope of  
   review; *Ultra vires*; War power
- Judicial decisions. *See* Ministers'  
 Powers, Committee on  
 Judicial discretion, 147  
 Judicial empiricism, 146, 150  
 Judicial justice, 68  
 Judicial lag, 149  
 Judicial process, advantages, 152  
 Jurisdictional fact. *See* Scope of review  
 Jurisdictional theory. *See* Judicial con-  
 trol  
 Justice according to law. *See* Rule of  
 law  
 Justice without law, 69, 101
- "Kangaroo" closure, 128  
 Kant, I., 10, 20  
 Kelly, C.B., 222  
 Kelsen, H., 9
- Labor Government, 47, 64, 65, 66, 98  
 Labor, Minister of, 79  
 Landis, J. M., 22, 37n., 65n., 130,  
 235n., 240, 242n., 254n., 260,  
 277, 278n., 280n., 282n., 291, 292  
 Laski, H., 10n., 14n., 33n., 43, 47n.,  
 147, 148, 230, 278n., 337
- Law:  
   antinomy inherent in, 2  
   conflict with administration, 13  
   executive power as a substitute for,  
   8-9  
   growing point of, 149  
   imperative theories of, 9  
   legality, opposed to, 3

- morals, infusion of, into, 149  
 morals, relation of, to, 213-14  
 realist theory of, 3  
*See also* Disappearance of law theories  
 Law, questions of. *See* Scope of review  
 Law Society, 258  
 "Laying." *See* Statutory Instruments, Parliamentary control of  
 Lenin, V. I., 5  
 Liberties of the subject, 15, 16, 336  
 Library, House of Commons, 111  
 Licensing cases, 257n.  
 Lincoln, A., 305n., 349-51, 353  
 Litigation, cost and difficulty of, 152  
 Llewellyn, K., 3n.  
 Local Government Board, 36, 37, 59, 71, 72, 73, 74, 88, 136, 193, 229, 230, 237, 245, 247, 294  
*London Gazette*, 133, 135, 269  
 London Plan, 1944, Greater, 269  
 Lorden, Sir J., 185n., 249n.  
 Lords, House of, 110, 111, 112, 114, 126, 168, 171, 176, 177, 186, 191, 194, 237, 245, 246, 271, 272, 275, 316, 323, 329-37, 339, 346, 349  
 Loreburn, Lord, L.C., 236  
 Luxmoore, L.J., 302  
 MacAndrew, Sir C., M.P., 117, 123n.  
 Macmillan, Lord, 171, 332n., 333, 335, 336, 347  
 McReynolds, J., 161  
 Madison, J., 14, 16n., 28  
 Magna Carta, 319  
 Mandamus, 74, 144, 155, 157, 230  
 Mansfield, Lord, 149  
 Marketing Boards, 96-97, 256-57  
 Marketing Boards, Departmental Committee on Imposition of Penalties by, 96n., 97, 256-57  
 Marshall, C.J., 25, 149  
 Martial law. *See* War power  
 Maugham, Viscount, 265n., 331, 333, 335n.  
 May, Sir E., 111n., 115n., 118n., 126n., 128  
 Medical Council, General, 258  
 Midwives Board, Central, 258  
 Ministers' Powers, Committee on:  
   appeals, time limit for, 206-8, 210  
   appointment and composition, 43  
   bias, 253, 259-60  
   conclusive-evidence clause, 63-64, 189  
   Crown as litigant, privileged position, 152  
   delegation upheld, 46  
   Henry VIII clause, 60-61  
   Hewart, Lord, answer to, 45  
   inspectors' reports, 247-50  
   judicial, quasi-judicial, and administrative decisions, 82-88  
   "laying" procedure, standardization of, 108  
   limitations upon delegations urged, 29  
   natural justice, 212  
   "no publication, no operation," 134  
   oral hearing, 246  
   reasoned decisions, 252  
   regulation-order distinction, 107  
   scant attention paid recommendations, 45  
   scrutinizing committee urged, 114, 128, 130  
   terms of reference, 43  
   weakness of report, 44  
 Minutes of Proceedings, 110  
 Mixed questions of law and fact. *See* Scope of review  
 Montesquieu, 15, 65  
 Morals. *See* Law; Natural justice  
 Morris, C., 281n., 284n.  
 Morrison, H., M.P., 47, 64, 110n., 115, 126, 142n., 326  
 Morton, Sir C., 264n.  
 Moulton, Lord, 160, 163, 247  
 Munitions, Minister of, 318, 319  
 Murphy, J., 359  
 National Coal Board, 66-67  
 National Fire Service Regulations, 109, 110n.  
 National Health Insurance Joint Committee, 79  
 National Insurance Commissioner, 80

- Nationalization, 65-67
- National Labor Relations Board,  
United States, 169, 292
- Naturalization. *See* Aliens
- Natural justice:  
bias, 253  
decision, process of, 237-39, 241-42  
due process, compared to, 213, 216  
evidence, *ex parte*, 264-68  
hearing, right to, 86, 216, 222-28  
imported into *ultra vires* doctrine,  
200, 213  
inspectors' reports, nondisclosure of,  
247, 249  
legislative powers, not governed by,  
172  
morals, relation to, 213-14  
oral hearing, 225, 237, 245-47  
procedural essentials required, 228  
Shaw, Lord, views of, 214-15  
*See also* Ministers' Powers, Com-  
mittee on; Public local inquiry
- Natural law, 10
- Natural rights of man, 14
- Navy, Secretary of the, United States,  
355
- Necessity, test of. *See* War power
- Negative resolution. *See* Statutory In-  
struments, Parliamentary control  
of
- Nineteenth-century ethic, 149
- No-evidence rule. *See* Scope of review
- Northampton, Statute of, 319
- Notice:  
British and United States practice  
compared, 221-22  
due process, required by, 216  
omission, defect of, 219n.  
procedure, 220-22  
review of sufficiency, 218-20  
statute, only where required by, 217  
statutory prescriptions mandatory,  
218
- Oaksey, Lord, L.J., 272, 274n.
- Obiter dicta* in House of Lords, 177
- Official notice, 268n.
- "One-who-decides-must-hear" principle,  
239-40
- Oral hearing. *See* Ministers' Powers,  
Committee on; Natural justice
- Orders, defined, 107, 205
- Parker, Lord, 343n.
- Parliament, supremacy of, 16, 29, 71,  
103, 316, 330
- Parliamentary control. *See* Statutory  
Instruments, Parliamentary con-  
trol of
- Parliamentary procedure, reform, 122
- Parmoor, Lord, 245
- Paschukanis, E., 7, 8n., 9
- Patent Agents, Institute of, 177, 258
- Pecuniary interest. *See* Bias
- Penalties. *See* Administrative justice;  
Delegated legislation
- People's courts, 100
- Personal justice, 68
- Personnel. *See* Public local inquiry
- Policy. *See* Judicial control
- Port, F., 42n., 74n., 196
- Post Office, 136n.
- Pound, R., 3n., 4n., 5n., 7n., 8n., 9,  
13n., 14n., 15n., 17n., 20, 68n.,  
69n., 70n., 101n., 140n., 146,  
147n., 149n., 150n., 214n., 215,  
250n.
- Prerogative writs, 75, 155, 156, 157,  
162, 184n., 196, 209, 210, 288-  
89
- President, United States, 27, 31, 32,  
52, 67, 343, 352, 354, 355-58
- Principle-detail dichotomy. *See* Dele-  
gated legislation
- Printed Paper Office, 110
- Procedure, intricacies of, 153
- Procedure, Select Committee on, 102n.,  
103n., 105n., 112n., 113n., 117n.,  
118n., 119n., 120n., 121n., 122,  
123n., 124n., 125n., 129n., 142n.
- Prohibition, 144, 155, 157, 161, 181,  
184, 185, 186, 209
- Property Owners, National Federation  
of, 185



## Public local inquiry:

analogous to hearing under Administrative Procedure Act, 73,  
226, 231

described, 231-33

personnel, problem of, 232, 245

procedure criticized, 234

*Pyrogallie Acid* case, 56, 167

"Quarantine," 106, 108, 136

Quasi-judicial decisions. *See* Ministers' Powers, Committee on

Questions in House of Commons, 112-13

Railway and Canal Commission, 91-93

Railway Courts, 91-94

Railway Rates Tribunal, 92, 93-94

Rating and Valuation Bill, 1928, 202-4

Reading, Earl of, C.J., 225, 294

Realist theory. *See* Law

Reasonable cause, 329-34

Reasoned decisions, 251-53

Reconstruction Finance Corporation, United States, 67

Referees, 79

Regulation 14 B. *See* War power

Regulation 18 B. *See* War power

Regulation-making power, omnibus, 38, 41

Regulations:

deferred effectiveness, 140-41

reasonableness, 173-75, 200

Rent control, 98-101

Rent Tribunals. *See* Administrative justice

Revenue Departments, 136n.

Review. *See* Judicial control; Scope of review

Review officers, 250-51

Rhodes, J., 339n., 350n.

Richards, H. E., 310n., 314n.

Rights, Bill of, 319

Roberts, J., 342

Robinson, Sir A., 60n., 206, 207n., 232n.

Robinson, G., 43n.

Robson, W. A., 21n., 24n., 42n., 71n., 72n., 82n., 84n., 92n., 93n., 143-

44, 147, 150, 176n., 242, 244, 258

Romer, Lord, 197, 336

Root, E., 26

Rule-discretion dichotomy, 4

Rule making, notice of, 138

Rule of law:

Brandeis, J., view of, 278

Dicey's definition, 11

incapable of exact definition, 2

justice according to law, 17

natural law concept, 11

positive law aspects, 11

principles above the State, 14

separation of powers, 15, 17

*See also* Judicial control

Rules and regulations, defined, 107, 205

Russell, Bertrand, 1n.

Russell, Lord, C.J., 174

Rudledge, J., 292-93, 335, 342

Sankey, Lord, L.C., 43, 56, 224

Satellite towns, 270

Schlesinger, R., 5n., 7n., 8n.

Schuster, Sir C., 21n., 113n.

Scope of review:

abuses, control of, 168, 303

broaden, attempts to, rejected, 199, 278

constitutional fact, 298-99

*de novo*, review, 299, 303

fact, questions of, 277-80, 281, 283-92, 295, 304

housing act cases, 209, 287-90, 294-97, 300-3

income-tax cases, 283-87

jurisdictional fact, 293, 297-304

law-fact distinction, 277, 280-86, 288, 295

law, questions of, 200, 277, 280, 283-92, 295

mixed questions of law and fact, 282, 292-97

no-evidence rule, 286-291, 295, 302

substantial-evidence rule, 201, 277-80, 282, 286, 288, 290, 291, 363

summarized, 23

- Scott, L.J., 34, 77n., 84, 135n., 174-76, 201, 208
- Scrutiny Committee. *See* Statutory Instruments, Select Committee on
- Scrutton, L.J., 160, 179-80, 188, 190, 283
- Secretary of State. *See* Home Secretary
- Selborne, Lord, 332
- Separation of functions, 255-56, 262-64, 276
- Separation of powers. *See* Rule of law
- Shaw, Lord, 167, 214-15, 238, 239, 248, 251
- Ship-Money* case, 314
- Shipping Controller, 318
- Shortened procedure, 246
- Silverman, S., M.P., 125n.
- Sitting days, 106, 109
- Skeleton legislation. *See* Delegated legislation
- Slesser, L.J., 96, 192, 193
- Slum clearance, 183, 201, 207, 231, 264-65
- Socialization of law, 69
- Soulbury, Lord, 116, 126
- Speaker, House of Commons, 111, 112, 116
- Specialized courts. *See* Administrative justice
- Special Orders Procedure, 115
- Standard. *See* Delegated legislation
- State:
- as insurance organizer, 40
  - as town planner, 39
  - change in role, 24
  - Duguit's theory of, 18
  - imperative theory of, 9
  - operating and service activities, 64, 67
  - Public-Service State, 18-21, 24, 98, 143
  - self-preservation, power of, 307
- See also* Rule of law
- Stationery Office, 133, 135
- Statutory Instruments:
- chronological table, 53, 55
  - defined, 108n.
  - explanatory notes, 141-42
  - Select Committee on, 116-22, 123, 124, 129, 130, 142, 327
- Statutory Instruments, Parliamentary control of:
- affirmative resolution, 52, 59, 104-6, 109, 114, 116, 126, 181, 182, 323
  - failure to "lay," 109-10
  - "laying," delay in, 121
  - "laying," effectiveness, 111, 113-14, 115, 127
  - "laying," lack of uniformity, 107
  - "laying," methods of, 104
  - "laying," standardization, 108-9
  - "laying," times prescribed, 107
  - "laying," United States practice, 131
  - negative resolution, 104, 108, 109, 111, 114, 116, 130, 324
  - power to amend, 125-26
  - United States counterparts, 130-32
- Statutory Rules and Orders. *See* Statutory Instruments
- Stevenage* case, 270-76
- Stone, C.J., 13, 341, 346n., 348-49, 360n.
- Subdelegated legislation, 135n. *See also* War power
- Subordinate legislation. *See* Delegated legislation
- Substantial-evidence rule. *See* Scope of review
- Substantial prejudice, 209
- Supremacy of law. *See* Rule of law
- Surveyors' Institution, 221
- Sutherland, J., 96, 257
- Swift, J., 155, 180, 244n., 266, 289-90, 295
- Talbot, J., 180
- Taney, C.J., 343n.
- Tariff Commission, United States, 52
- Tax Court, United States, 95
- Tax, power to. *See* Delegated legislation
- Tennessee Valley Authority, United States, 67
- Thankerton, Lord, 188, 272, 273, 274
- Tomlin, Lord, 187n.



Town and Country Planning, Minister of, 269-76

Town planning schemes, 205, 269-76

Trade, Board of, 51, 52, 62, 136n., 177, 178, 258, 259

Traffic Commissioners, 76

Transport Commission, 94

Transport, Minister of, 48, 74, 76, 174, 181, 197, 198, 206n.

Transport Tribunal, 94

Treasury, 51, 52, 95, 263

#### *Ultra vires:*

adequacy of review based upon, 199  
conclusive-evidence clause, 188-94

"effect-as-if-enacted-in-this-Act" clause, 176-88

fact, permits judicial consideration of, 201

judicial control, keystone of, 175

literal application, 200

regulations, review of, 172-76, 200

review based upon, 165, 172

Vanderbilt, A. T., 132n.

Vicarious decision, 238

Votes and proceedings, 110

Wade, E. C. S., 121n., 139n., 157n., 172n., 174n., 175n., 204n., 222n.

War Labor Board, National, United States, 356

War power:

Civil War, United States, 349-52

Defence of the Realm Regulations, 315-16

Defence Regulations, 141, 320, 321, 324, 325-27

delegations, 314, 341-43, 354-55  
extent, 305, 313, 315-16, 325, 335-36, 339, 343, 357

Japanese evacuation, 358-63

judicial control, 317-20, 327-39, 343-49, 351-52, 355, 357-63

martial law, 305-13, 322, 345-46, 351

necessity, test of, 308, 310-11, 343-46, 348, 355, 360-63

regulation 14 B, 316-17, 332-34

regulation 18 B, 326, 328-37, 358, 359

subdelegation, 322

sublegislation, hierarchy of, 327

United States practice, 339-63

World War, First, 314-20, 352-54

World War, Second, 320-39, 354-63

War Relocation Authority, United States, 358-59, 362

War, Secretary of, United States, 355

War Works Commission, 262-63

War Zone Courts, 322

Watson, Lord, 166, 178

Weiner, F., 308n.

Wheat Commission, 170-72

Wilkinson, E., M.P., 47n., 113

Williams, Vaughan, L.J., 215n.

Willis, J., 26n., 30n., 35n., 36n., 37n., 44n., 49n., 53, 62n., 631f., 185n., 192n., 194n., 205n.

Wilson, W., 353-54, 355

Withers, Sir J., 235n.

World War, First. *See* War power

World War, Second. *See* War power

Wrenbury, Lord, 284-85

Wright, Lord, 332, 334

